United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE STEPHENS

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6647

SPECIAL CALENDAR.

844

UNITED STATES EX REL. MAX D. ORDMANN, APPELLANT,

vs.

HOMER S. CUMMINGS, ATTORNEY-GENERAL OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 20, 1936.

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United States Court of Appeals for the District of Columbia

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United States Court of Appeals for the District of Columbia

No. 6647.

U. S. ex Rel. Max D. Ordmann, Appellant,

vs.

Homer S. Cummings, Attorney-General of the United States.

---

a Supreme Court of the District of Columbia.

At Law.

No. 85890.

United States ex Rel. Max D. Ordmann, Relator,

vs.

Homer S. Cummings, Attorney-General of the United States, Respondent.

United States of America,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 85890.

UNITED STATES ex Rel. MAX D. ORDMANN, 233 Broadway, New York, N. Y., Relator,

v.

HOMER S. CUMMINGS, Attorney General of the United States, Washington, D. C., Respondent.

Petition for Writ of Mandamus.

Filed June 17, 1935.

The petition of the relator, Max D. Ordmann, respectfully shows unto the Court as follows:

1. That the relator is a citizen of the United States and a resident of the State of New York and is a member of the bar of the highest court of the State of New York and a practicing attorney in the City of New York with offices at 233 Broadway, New York, N. Y.

2. That the respondent, Homer S. Cummings, is now and has been since March 4, 1933, the Attorney General of the United States, and is a citizen of the United States, at this time residing in the District of Columbia, with his office as Attorney General of the United States in the Department of Justice in the District of Columbia.

3. That from April 24, 1933, until June 30, 1934, inclusive, Urey Woodson was the Alien Property Custodian of the United States with his office as such Alien Property Custodian in the District of Columbia.

2 4. That on May 1, 1934, the President of the United States signed and issued an Executive Order (No. 6694) entitled "Abolishment of the Office of the Alien Property Custodian and Transfer of Its Functions to the Department of Justice," which went into effect on July 1, 1934. The said Executive Order provided that—

"1. The Office of the Alien Property Custodian is abolished, and the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Cus-

todian by law and/or Executive order are transferred to the Department of Justice, to be administered under the supervision of the Attorney General. * * *

"4. (a) All funds, securities, choses in action, real estate, patents, trade marks, copyrights, and all other property of whatsoever kind, to which the Alien Property Custodian has title or which are in his possession or control, or which are held in trust for the Alien Property Custodian, are hereby transferred to the Attorney General, to be administered and disposed of by him as required by law. The Alien Property Custodian is hereby authorized and directed to execute all such deeds, conveyances, transfers, assignments, and other documents and to take all such steps as the Attorney General may deem necessary or proper to effectuate the provisions of this order."

5. That the relator is the plaintiff in the case of Max D. Ordmann, Plaintiff, v. Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, Plauen, Vogtlandt, Germany, Defendants, At Law No. 84,158 in the Supreme Court of the District of Columbia; that said Action at Law No. 84,158 was instituted under and pursuant to Section 30 of the Trading with the Enemy Act and the Code of Laws for the District of Columbia; that upon the filing of said Action at Law No. 84,158 the Supreme Court of the District of Columbia issued a writ of attachment directing the United States Marshal for the District of Columbia to attach and seize property and credits of the defendants in the hands of
3 Urey Woodson, Alien Property Custodian, Garnishee, to the value of $6,587.60 and the further sum of $100.00 for costs to satisfy the plaintiff's claim against said defendants in said action at law, which writ of attachment and interrogatories of the plaintiff were duly served on Urey Woodson, Alien Property Custodian, Garnishee; that said interrogatories contained the following question:

"Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?";

that on June 29, 1934, the said Urey Woodson, as Alien Property Custodian, Garnishee, executed an answer to said interrogatories, which was filed in the Supreme Court of the District of Columbia on June 30, 1934, in which he stated in answer to the above-quoted interrogatory that as Alien Property Custodian he had in his charge at the time of the service of the said writ of attachment and at the time of the execution of his said answer Patents Nos. 961830, 995394 and 995395 and $39,784.79 in cash which was originally seized by a former Alien Property Custodian as the property of the defendants.

6. That the defendants were duly served and given notice of the suit in accordance with the Code of Laws for the District of Columbia but they never entered any appearance in the case.

7. That on September 18, 1934, after the expiration of more than 40 days after the first publication of the order for the service of the defendants by publication and after the attorney for the plaintiff had filed an affidavit in said case, At Law No. 84,158, showing that on August 18,
4 1934, he mailed, postpaid, a copy of the advertisement of said order of publication to the defendants and each of them at Plauen, Vogtlandt, Germany, their last known place of residence, and the defendants not having made any appearance, the plaintiff, having verified his demand in said case, moved for judgment against the defendants and said motion was granted, and the Supreme Court of the District of Columbia thereupon entered a judgment in said case in favor of the plaintiff, Max D. Ordmann, and against said defendants in the sum of $6,587.60, with interest thereon from the 18th day of September, 1934, together with the costs of said suit in the sum of $57.80. Thereupon, and after the rendition of said judgment, and on September 18, 1934, the plaintiff moved the said Court for a judgment of condemnation against the credits of the defendants attached by the United States Marshal and in the hands of Homer S. Cummings as Attorney General of the United States and as successor to the authority, rights, privileges, powers and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee, and said Court thereupon and

on said date entered a judgment of condemnation, which provides that—

"Whereupon, it appearing by the answer of the said garnishee filed herein on June 30, 1934, that he holds in trust for the said defendants, Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, cash in the sum of $39,784.79, and nothing having been shown to the contrary, it is ordered that so much thereof of said sum as may be necessary be condemned in the hands of Homer S. Cummings as Attorney General of the United States and as successor to the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee, toward the satisfaction of the plaintiff's recovery herein and execution thereof be had."

5 8. That the defendants never appealed from the said judgment entered against them on September 18, 1934, and the time for appeal therefrom has expired, and the defendants have not paid said judgment or any part thereof.

9. That the respondent, Homer S. Cummings, as Attorney General of the United States, has not appealed from the said judgment of condemnation entered on September 18, 1934, and the time for appeal therefrom has expired.

10. That the relator has duly demanded of the respondent, Homer S. Cummings, as Attorney General of the United States, that he forthwith pay to the relator the said sum of $6,587.60 with interest thereon from September 18, 1934, together with costs in the sum of $57.80 in accordance with said judgment of condemnation, which demand said respondent has refused and continues to refuse.

11. The relator further alleges that his demand having been made as aforesaid and said demand having been refused by the respondent, said action on the part of the respondent is without justification of law, and that the payment of said judgment of condemnation being merely a ministerial act required of the respondent by law and not

necessitating any exercise of discretion, the relator is entitled to the relief from this Court sought hereby.

12. The relator alleges that prior to the filing of this petition he has exhausted all the remedies open to him to obtain the payment of said judgment of condemnation, and that his said demand having been unlawfully and unjustly denied by the respondent, there is no other adequate remedy open to the relator except as herein sought.

Wherefore, the relator prays:

1. That a rule may issue from this Honorable Court directing the respondent to appear before this Court
6 at a day to be named therein and show cause, if any he has, why a writ of mandamus should not be issued commanding and directing the respondent to forthwith pay to the relator the sum $6,587.60 with interest thereon from September 18, 1934, together with costs in the sum of $57.80 as contained in and in accordance with the judgment of condemnation entered by this Court on September 18, 1934, in Action at Law No. 84,158, and the costs of the present action.

2. That a writ of mandamus issue to said respondent commanding and directing said respondent to forthwith pay to the relator the sum of $6,587.60 with interest thereon from September 18, 1934, together with costs in the sum of $57.80, as contained in and in accordance with the judgment of condemnation entered by this Court on September 18, 1934, in Action at Law No. 84,158, and the costs of the present action.

3. For such other and further relief as the nature of the case may require.

MAX D. ORDMANN,
Relator.

THOMAS E. RHODES,
Attorney for the Relator.

CITY, COUNTY AND STATE OF NEW YORK, *ss:*

Max D. Ordmann, being first duly sworn, says that he is the relator in the foregoing case; that he has read this petition for writ of mandamus, and knows the con-
7 tents thereof, and that the matters and things set forth therein are true to the best of his knowledge,

information and belief, and that he verily believes the facts stated in said petition to be true.

MAX D. ORDMANN.

Subscribed and sworn to before me this the 18th day of February, 1935.

[NOTARIAL SEAL.] EDWARD J. REILLEY,
Notary Public.

Notary Public, New York County.
N. Y. Co. Clk's No. 338, Reg. No. 6-R-460.
Kings Co. Clk's No. 170, Reg. No. 6311.
Queens Co. Clk's No. 833, Reg. No. 3253.
Term expires March 30, 1936.

8 *Rule to Show Cause.*

Filed June 17, 1935.

* * * * * * *

Upon consideration of the Petition filed in the above-entitled case on June 17, 1935, it is by the Court this the 17th day of June, 1935,

Ordered That the Respondent, Homer S. Cummings, Attorney General of the United States, appear before this Court at 10 o'clock A. M. on the 25th day of June, 1935, and show cause, if any he has, why the prayers of said petition should not be granted and a writ of mandamus issued as therein prayed.

DANIEL W. O'DONOGHUE,
Justice.

Marshal's Return.

Served a copy of the above rule on the above named Homer S. Cummings, Attorney General of the United States, Washington, D. C., Respondent, personally June 17, 1935.

JOHN B. COLPOYS,
U. S. Marshal in and
for the Dist. of Columbia.
By HARRY C. ALLEN,
Deputy U. S. Marshal.

K.

9 *Amended Answer to Petition and Rule to Show Cause.*

Filed October 28, 1935.

* * * * * * *

Now comes the respondent Homer S. Cummings, Attorney General of the United States, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for the writ of mandamus filed herein, and reserving unto himself all the benefits of the lack of jurisdiction of the Court appearing on the face of said petition to grant the relief prayed; and the lack of jurisdiction of the Court to direct the respondent as Attorney General of the United States to perform the acts in question, and relying on the same as if demurrer had been specifically interposed, for amended answer to said petition and return to the rule to show cause, or so much thereof as is material for him to answer, answering says:

1. The respondent admits the averments contained in paragraph 1 of said petition.

2. The respondent admits the averments contained in paragraph 2 of said petition

3. The respondent admits the averments contained in paragraph 3 of said petition.

10 4. The respondent admits the averments contained in paragraph 4 of said petition.

5. Answering the averments in paragraph 5, the respondent says that it is true that the relator herein is the plaintiff in the case of Max D. Ordmann v. Vogtlandische Maschinen-Fabrik, et al., At Law 84,158; but the respondent denies that said suit was instituted under and pursuant to §30 of the Trading with the Enemy Act; but admits that a writ of attachment and interrogatories purporting to be pursuant to §30 of the said Act were issued as stated in paragraph 5 of said petition. The respondent admits that the interrogatories served upon the said Woodson contained the questions set forth by the relator but avers that the answer of

said Woodson stated, in addition to the matter set forth by the relator, as follows:

"Under the laws and Executive Orders now in effect no part of said money is payable or returnable to the said Executor and the said Vogtlandische Maschinen-Fabrik."

Further answering the averments in paragraph 5 the respondent says that on June 27, 1934, the date of the service of said interrogatories and two days before the answer of said Woodson, the President approved Public Resolution 53, 73rd Congress (48 Stat. 1267) (Exhibit A). Said Resolution provided:

"* * * Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, *all payments, conveyances, transfers, or deliveries of money or property* or the income, issues, profits, and/or avails thereof *authorized or directed to be made under the Trading with the Enemy Act,* as amended, or the Settlement of War Claims Act of 1928, as amended, *whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved:* * * * Provided further, That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution;"

By Executive Order No. 6981, March 2, 1935, (Exhibit B) the restrictions of Public Resolution 53 were removed as to certain classes of claimants but not as to Vogtlandische Maschinen-Fabrik, or as to the present relator. That Executive Order, as amended by Executive Order No. 7111, July 22, 1935 (Exhibit C) reads in part as follows:

"Section 2. The restrictions imposed by the said resolution are hereby removed except as to the following payments, conveyances, transfers, or deliveries of money or property or of the income, issues, profits, or avails thereof: * * *

"2. To any corporation, association, or partnership, or other unincorporated body of individuals or a body politic which on or at any time since April 6, 1917, was organized or existed under the laws of Germany or had its principal place of business in Germany * * *

"4. To the heirs, devisees, legatees, executors, administrators, representatives, creditors, successors, or assigns of any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof, except to such heirs, devisees, or legatees as are natural persons and have been nationals of the United States from June 1, 1934, to the time of payment, conveyance, transfer, or delivery, and except to such creditors as are not German nationals and are eligible claimants under section 9, subsections (a) and (e) of the Trading with the Enemy Act, as amended."

6. The respondent admits the averments contained in paragraph 6 thereof.

7. Answering averments of paragraph 7 the respondent says that it is true that on September 18, 1934 the Court purported to render a judgment against certain named defendants in the suit At Law No. 84,158; and that on this same date the Court purported to enter a judgment of condemnation against Homer S. Cummings as Attorney General in the form as set forth in paragraph 7 of said petition. Further answering said averments the respondent says that the entering of said judgment of condemnation against him must be considered as null and void be-
12 cause Public Resolution 53 (48 Stat. 1267) has suspended the jurisdiction of that Court to act in the matter, and for the further reason, that no funds had ever been attached in his hands.

8. The respondent admits the averments contained in paragraph 8 thereof.

9. The respondent admits that he has never appealed from the purported judgment of condemnation entered on

September 18, 1934, but avers that he personally received no notice of the entry of said judgment until November 11, 1934, which date was after the time had elapsed for taking an appeal therefrom, except that the respondent is informed that the attorney for said Ordmann, the relator, on or about September 24, 1934 advised one W. L. Gates, an attorney in the Claims Section of the Alien Property Bureau of the entry of said judgments and handed him a certified copy thereof, and Mr. Justice Adkins also telephoned to said Gates thereafter with reference to said judgment; that said Gates had no authority to act for the Attorney General in litigated matters, nor otherwise to receive notice of any such matters on behalf of the Attorney General; that the first notice of the pendency of the litigation and of the entry of the judgments which came to the attention of the respondent consists of a letter addressed to the Attorney General under date of November 10, 1934, by the attorney for the relator, demanding payment of the purported judgment of condemnation.

10. The respondent admits the averments of fact contained in paragraph 10 of said petition.

11. Answering averments in paragraph 11, the respondent denies that his action in refusing payment of said void judgment is without justification and he denies that
13 payment thereof would be a ministerial act, but on the contrary avers that he is prohibited by law from performing the act of payment sought to be enforced herein.

12. The respondent states that all averments contained in paragraph 12 of said petition are conclusions of law requiring no answer.

13. Further answering said petition, and as a separate and distinct answer, the respondent says that a writ of mandamus should not be granted at this instance for the following reasons:

1. The relator herein seeks to enforce a judgment which is completely null and void because it was rendered by a court that had been deprived of its jurisdiction to enter a judgment in attachment under Section 30 of the Trading with the Enemy Act.

2. The credits held by the United States in favor of Vogtlandische Maschinen-Fabrik et al., which the relator now seeks, were not at the time of said judgment, nor are

they now, in view of Public Resolution 53, 73rd Congress, and in view of Executive Order No. 6981, immediately due and payable to Vogtlandische Maschinen-Fabrik et al.; and therefore, under the Code of the District of Columbia which provides that "if said credits shall not be immediately due and payable, execution shall be stayed until the same shall become due," these credits may not be ordered to be paid over at this time. (D. C. Code, Title 24, c. 143.)

3. Public Resolution 53, 73rd Congress postpones all payments of money authorized to be made by the Trading with the Enemy Act as amended, whether or not a judgment or decree has been entered with respect thereto.

4. This action for the payment over of money or property seized under the Trading with the Enemy Act is
14 essentially an action against the United States, and as such may not be maintained without the consent of the United States.

5. The sole relief and remedy of any person having any claim to money or other property delivered or paid over to the Alien Property Custodian or seized by him is that provided for by the terms of the Trading with the Enemy Act, but that act does not provide for the remedy of a writ of mandamus.

6. Under Executive Order No. 6694 of May 1, 1934 the office of the Alien Property Custodian was abolished, effective sixty days after May 1, 1934, and the said Custodian, Urey Woodson, who answered the interrogatories referred to in paragraph 5 of relator's petition became *functus officio* upon June 30, 1934. No interrogatories were served upon the respondent as his successor in interest, no attachment was made of funds in the respondent's hands, nor was any notice served upon the respondent of the pendency of said action. The judgment in condemnation against the respondent was improperly entered and is therefore null and void because no order had ever been made substituting as garnishee Homer S. Cummings, as Attorney General, for Urey Woodson, the original garnishee. No breach of ministerial duty justifying a writ of mandamus can be predicated upon the failure of the respondent to comply with a judgment entered in a proceeding to which he was not a party, and of which he received no notice except as herein set out in paragraph 9 *supra*.

15 Wherefore, having fully answered the allegations of the petition the respondent prays that the rule to show cause be discharged and that the petition be dismissed.

HOMER S. CUMMINGS,
Attorney General of the United States;
ANGUS D. MacLEAN,
Assistant Attorney General;
LESLIE C. GARNETT,
United States Attorney;
HARRY L. JONES,
Attorney, Department of Justice;
JOHN W. SCOTT,
Attorney, Department of Justice;
EDWARD FIRST,
Attorney, Department of Justice;
Attorneys for the Defendants.

CITY OF WASHINGTON,
District of Columbia, ss:

Homer S. Cummings, being first duly sworn, says that he has read the foregoing amended answer and return which is subscribed to by him as Attorney General of the United States; that the matters and things therein recited are true as he is informed and believes.

HOMER S. CUMMINGS.

Subscribed and sworn to before me this 28th day of Oct. 1935.

[NOTARIAL SEAL.] UGO J. A. CARUSI,
Notary Public in and for the District of Columbia.

My commission expires on the 15th day of May, 1938.

16 *Demurrer to Amended Answer of Respondent.*

Filed November 19, 1935.

* * * * * * *

The relator says that the amended answer of the respondent to the petition and rule to show cause is bad in substance.

1. The amended answer of the respondent admits all the material averments set forth in the petition, which material averments of the petition show that this Court entered a valid judgment in favor of the relator and against the defendants in the case of Max D. Ordmann v. Vogtlandische Maschinen-Fabrik et al., At Law No. 84,158, on September 18, 1934, in the sum of $6,587.60, with interest thereon from the 18th day of September, 1934, together with costs in the sum of $57.80, and that thereafter and on September 18, 1934, this Court entered a valid judgment of condemnation of funds of the defendants in the hands of the respondent in the amount necessary to satisfy the relator's said judgment; that the said judgment debtors have not appealed from said judgment, and have not paid said judgment or any part thereof, and that the respondent has not appealed from said judgment of condemnation and that the time for an appeal has expired, and that the relator has duly demanded of the respondent that he pay said judgment of condemnation and that the respondent has refused and continues to refuse to pay said judgment. Wherefore, the relator is entitled in law to a peremptory writ of mandamus requiring the respondent to pay said judgment of condemnation.

2. That no motion to vacate or set aside said judgment or judgment of condemnation has ever been filed, and the term at which said judgments were entered having expired on October 1, 1934, this Court now has no jurisdic-
17 tion to vacate said judgments.

3. That the respondent in his answer to the petition for writ of mandamus cannot question or attack the validity of the said judgment of condemnation.

4. That the judgment of condemnation condemned certain specific personal property of the defendants, Vogtlandische-Maschinen-Fabrik et al., in the hands of the respondent in the amount necessary to satisfy the relator's claim.

5. That the respondent in his answer to the petition for writ of mandamus cannot question or attack the validity of the said judgment of condemnation or the jurisdiction of this Court to enter said judgment of condemnation. That even if the respondent could in his answer question or attack the validity of said judgment of condemnation or the jurisdiction of this Court to enter the same, the Joint Resolution

(No. 53—73d Congress) has no application to the claim of the relator, a citizen of the United States, and it does not repeal the provisions of Section 30 of the Trading with the Enemy Act, c. 167, 45 Stat. 254, 276.

6. That if the said Joint Resolution should be construed to deprive the relator of the money here sought to be recovered, said Joint Resolution is unconstitutional, null and void and violative of the Fifth Amendment to the Constitution of the United States, in that,

(a) It would deprive the relator of property rights vested in him prior to the enactment of said Joint Resolution.

(b) It would arbitrarily and capriciously discriminate against the relator and accord to him different treatment from that accorded to other citizens of the United States.

(c) It would deprive the relator of his property without due process of law.

(d) It would deprive the relator of his property without just compensation.

7. The amended answer of the respondent not only
18 fails to deny any of the material facts set forth in the petition but affirmatively shows that the relief prayed for in the petition should be granted and that an order should be entered granting the peremptory writ of mandamus prayed for in said petition against the respondent.

THOMAS E. RHODES,
Attorney for the Relator.

Service of a copy of the foregoing demurrer, together with a copy of the attached Brief of Points and Authorities in support thereof, acknowledged this the 19th day of November, 1935.

LESLIE C. GARNETT,
United States Attorney,
Attorney for the Respondent.

19 *Motion for Reargument of the Relator's Demurrer to the Amended Answer of the Respondent.*

Filed December 18, 1935.

* * * * * * *

Now comes the Relator, by his attorney, and moves the Court to grant a reargument of the demurrer of the relator

to the amended answer of the respondent, and for grounds therefor, in addition to the grounds set forth in the demurrer, says:

1. That the explanatory statements of the Committee members in Congress in charge of the Joint Resolution (Pub. 53—73d Congress) at the time of its passage show conclusively that Congress did not intend for said Joint Resolution to apply to any judgment entered in favor of a citizen of the United States, or to prohibit the payment of any judgment of condemnation entered in favor of a citizen of the United States.

2. That the relator had a vested right for and with respect to the amount contained in his judgment of condemnation, entered in case At Law No. 84,158, prior to June 27, 1934, the date of the approval of said Joint Resolution, of which he could not be deprived by statute.

3. That if said Joint Resolution is construed to deprive the relator of the money here sought to be recovered said Joint Resolution is unconstitutional, null and void and violative of the Constitution of the United States in that it constitutes a complete delegation of legislative power in violation of Article 1, Section 1, of the Constitution.

THOMAS E. RHODES,
Attorney for the Relator.

Service of a copy of the foregoing motion, together with a copy of the attached memorandum of Points and Authorities in support thereof, acknowledged this 18th day of December, 1935.

LESLIE C. GARNETT,
United States Attorney,
Attorney for the Respondent.

S.

21 In the Supreme Court of the District of Columbia.

At Law.

No. 84158.

MAX D. ORDMANN, 233 Broadway, New York City, Plaintiff,

v.

VOGTLANDISCHE MASCHINEN-FABRIK and ALFRED RIETZSCH, as Administrator of Robert Zahn, Deceased, Otherwise Known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, Deceased, Plauen, Vogtlandt, Germany, Defendants.

Declaration.

Filed June 27, 1934.

First Count.

The plaintiff, Max D. Ordmann, a member of the bar of the highest court of the State of New York and a practicing attorney in the City of New York, sues the defendants, Vogtlandische Maschinen-Fabrik otherwise known as Vogtlandische Machinen Fabrik, a corporation organized under and by virtue of the laws of Germany and the defendant, Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, for that, heretofore, to wit, in the month of May, 1922, the plaintiff, at the special instance and request of the defendants, became the attorney at law for the defendants in the United States of America and the defendants employed and retained the plaintiff as their attorney at law to represent them in the United States of America in connection with certain claims which the defendants desired to assert to royalties earned upon United States patents owned by the defendants and which had been licensed under the provisions of Section 10 of the Act of Congress of October 6, 1917, known as the Trading With the Enemy Act to Robert Reiner, Incorporated, an American corporation; that, at the special instance and request of the defendants, plaintiff undertook to

and did represent the defendants in the prosecution of their said claims and performed numerous and sundry professional services on behalf of and for the enjoyment
22 of said defendants as will more fully appear from the particulars of demand attached hereto, incorporated herein and made a part hereof; that as a result of these services of the plaintiff a decree was secured in the United States District Court for the District of New Jersey directing the payment by Robert Reiner, Incorporated, to the Alien Property Custodian of a sum in excess of $30,000 to be held to the credit of the defendants; that for all of the said services defendants agreed to pay to the plaintiff such compensation as would constitute a reasonable amount for his services as such attorney under all the circumstances; that a reasonable compensation to the plaintiff for said services is $7,000; that in addition to the said services the plaintiff expended in connection with said services and as necessarily incident thereto the sum of $657.20 as will more fully appear from said particulars of demand; that the plaintiff has received from said *plaintiff* in payment of said compensation only the sum of $2,000 and has been reimbursed for said expenses only in the sum of $481.46; that there is now due and owing to the plaintiff the sum of $5,000 for his professional services and the further sum of $175.74 for disbursements; that the defendants, although often demanded, have failed and refused to pay the said amounts due to the plaintiff and there is now due and owing to the plaintiff the sum of $5,175.74;

Wherefore, plaintiff demands judgment for $5,175.74 together with costs.

Second Count.

The plaintiff, Max D. Ordmann, a member of the bar of the highest court of the State of New York and a practicing attorney in the City of New York, sues the defendants, Vogtlandische Maschinen-Fabrik otherwise known as Vogtlandische Machinen Fabrik, a corporation organized under and by virtue of the laws of Germany and the defendant, Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Reichtsenwalt Rietzel,
23 Executor of Robert Zahn, deceased, for that, heretofore, to wit, in March, 1928, the plaintiff, at the special instance and request of the defendants, undertook, as attorney at law for the defendants, the representation of

the defendants in connection with their claim to recover from the Alien Property Custodian and the Treasurer of the United States under Section 9 of the Trading With the Enemy Act as amended by the Settlement of War Claims Act of 1928 certain money in the sum of $47,062; that the plaintiff entered upon the performance of said duties as such attorney in connection with said claim and rendered numerous services in connection therewith; that the reasonable value of plaintiff's services in connection with said claim is three per cent (3%) or the amount of $1,411.86, no part of which has been paid; that defendants, although frequent demands have been made upon them, have failed and refused to pay any part of said amount; that the plaintiff is entitled to recover for his services in connection with said claim the said sum of $1,411.86;

Wherefore, plaintiff demands judgment in the amount of $1,411.86, with costs.

THOMAS E. RHODES,
DEAN HILL STANLEY,
Attorneys for the Plaintiff.

24 *Affidavit of Merit and for Attachment Before Judgment.*

Filed June 27, 1934.

STATE OF NEW YORK,
County of New York, ss:

Max D. Ordmann, being first duly sworn, upon his oath deposes and says that he is a member of the bar of the highest court of the State of New York and of the other courts of that state and a practicing attorney in the city of New York; that he has been a member of the said bar and practicing attorney since 1909 and has been a registered United States patent attorney since 1903;

Affiant is plaintiff in the above entitled cause in which Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, are defendants; that defendant Vogtlandische Maschinen-Fabrik, also known as Vogtlandische Machinen Fabrik is a corporation organized under the laws of Germany and is not a resi-

dent of the District of Columbia; that the defendant Alfred Rietzsch, also known as Reichtsenwalt Rietzel, individually and as administrator of the estate of Robert Zahn, is a resident of Germany and is not a resident of the District of Columbia; that in the month of May, 1922, the defendants employed and retained the plaintiff as their attorney at law to represent them in the United States of America in connection with certain claims they desired to assert to royalties upon United States patents owned by de-
25 fendants and which had been licensed under the provisions of Section 10 of the Act of Congress of October 6, 1917, known as the Trading with the Enemy Act to Robert Reiner, Incorporated, an American corporation. At the special instance and request of said defendants plaintiff undertook to and did represent the defendants in the prosecution of their said claims and performed numerous and sundry professional services on behalf of and for the enjoyment of said defendants as will more fully appear from the particulars of demand attached hereto, incorporated herein and made a part hereof; that all of these services of the plaintiff resulted in the securing of a decree of the United States District Court for the District of New Jersey directing the payment by Robert Reiner, Incorporated to the Alien Property Custodian of a sum in excess of $30,000.00 to be held to the credit of the defendants; that for all of this service the defendants agreed to pay to the plaintiff such compensation as would constitute a reasonable amount for his services as such attorney under all the circumstances; that a reasonable compensation to the plaintiff for said services is $7,000.00; that in addition to the said services the plaintiff expended in connection with the said services and as necessarily incident thereto, the sum of $657.20, as will more fully appear from said particulars of demand; that the plaintiff has received from the defendants in payment of said compensation only the sum of $2,000.00 and has been reimbursed for said expenses only in the sum of $481.46, leaving a balance due to the plaintiff of $5,000.00 for his professional services and $175.74 for disbursements; that the plaintiff is justly entitled to recover from the defendant for said services and disbursements the sum of $5,175.74, exclusive of all set-offs and just grounds of defense;

In March, 1928, the plaintiff, at the special instance and request of the defendants, undertook the representation of the defendants in connection with their claim to recover
from the Alien Property Custodian and the Treas-
26 urer of the United States under Section 9 of the
Trading With the Enemy Act as amended by the Settlement of War Claims Act of 1928, certain money in the amount of $47,062.00; that the plaintiff entered upon the performance of said duties as attorney for the defendants in connection with said claim and rendered service in connection therewith; that the reasonable value of the plaintiff's services in connection with said claim is three per cent (3%) thereof or the amount of $1,411.86, no part of which has been paid; that the plaintiff is entitled to recover for his services in connection with the said claim for the return of said money the said amount of $1,411.86; exclusive of all set-offs and just grounds of defense.

Plaintiff has a just right to recover the aforementioned sums of $5,175.74 and $1,411.86, or a total of $6,587.60, exclusive of all set-offs and just grounds of defense as set forth in the declaration in this cause.

MAX D. ORDMANN.

Subscribed and sworn to before me this 23rd day of June, 1934.

[NOTARIAL SEAL.] EDWARD J. REILLEY,
Notary Public, New York County.

N. Y. Co. Clk's No. 338, Reg. No. 6-R-460.
Kings Co. Clk's No. 170, Reg. No. 6311.
Queens Co. Clk's No. 833, Reg. No. 3253.
Term expires March 30, 1936.

27 *Particulars of Demand.*

Filed June 27, 1934.

Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, Deceased, Otherwise Known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, Deceased, to Max D. Ordmann, dr.:

Professional Services as Follows:

Examination of seventy-five (75) United States patents and machines preparatory to the institution of suit under

Section 10 of the Act of October 6, 1917, known as the Trading with the Enemy Act;

Institution of suit in equity in the United States District Court for the District of New Jersey (Equity No. 3887) on behalf of defendants against Robert Reiner, Inc.;

Prosecution of said suit;

Preparation and motion for letters rogatory in connection with said suit;

Preparation of numerous stipulations and orders in said suit;

Preparation of agreements between defendants and Robert Reiner, Inc;

Many conferences in connection with said suit with officials of United States government in Washington;

Numerous conferences with representatives of the defendants;

Services in connection with tax claims made by United States government against the defendants in connection with the defendants' claim;

Consent to an order in a suit by the Alien Property Custodian against Robert Reiner, Inc. that the amount of royalties involved should be paid to the Alien Property Custodian to the account of the defendants.

Fee for foregoing services		$7,000.00
Disbursements:		657.20
		$7,657.20
Credits:		
Paid on account of fee	$2,000.00	
Paid on account of disbursements	481.46	2,481.46
Carried Forward		$5,175.74
28 Brought forward		$5,175.74
Services in connection with claim of defendants against the Alien Property Custodian for the return of money pursuant to the Trading With the Enemy Act as amended by the Settlement of War Claims Act in 1928		1,411.86
Total fee with costs of this action		$6,587.60

THOMAS E. RHODES,
DEAN HILL STANLEY,
Attorneys for the Plaintiff.

29 *Writ of Attachment Before Judgment.*

In the Supreme Court of the District of Columbia.

At Law.

No. 84158.

MAX D. ORDMANN, 233 Broadway, New York City, Plaintiff,

vs.

VOGTLANDISCHE MASCHINEN-FABRIK & ALFRED RIETZSCH, as Adm. of Robt. Zahn, decd., Otherwise Known as Vogtlandische Machinen Fabrik & Reichtsenwalt Rietzel, Exec of Robt. Zahn, decd., Plauen, Vogtlandt Germany, Defendants.

The President of the United States, to the Marshal for said District, Greeting:

You are hereby commanded to attach, seize, and take into your custody the defendants' lands and tenements, property and credits which shall be found in this District, to the value of $6,587.60, being the amount of the plaintiff's demand against the defendants, as shown by his affidavit, and claimed in his declaration; and the further sum of $100.00, for the costs and charges which may accrue in the premises; and the same, so attached, safely keep, subject to the orders of the Court, unless the defendants or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety or sureties to abide by and perform the judgment of the Court in relation to said property. And should you attach the defendants property or credits in the possession of any other person or persons than the defendants you shall notify such person or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them as well as on said defendants, to appear in said Court on or before the twentieth day, exclusive of Sundays and legal holidays, accruing after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

Witness, the Honorable Chief Justice of said Court, the 27″ day of June, A. D. 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.
By ANDREW A. HORNER,
Assistant Clerk.

Notice.

June, 1934.

To Vogtlandische Maschinen-Fabrik & Alfred Rietzsch, as Adm. of Robert Zahn, decd., Otherwise Known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, Deceased, Defendants; Urey Woodson, Alien Property Custodian, Garnishee:

You are hereby notified to appear in the Supreme Court of the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendants, seized by virtue of the foregoing Writ of Attachment in the hands of Urey Woodson, Alien Property Custodian, Garnishee (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

JOHN B. COLPOYS,
U. S. Marshal.
By WM. J. KIRKLAND,
Deputy.

Marshal's Return.

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code.

—— —, 1934.

Attached credits, property of the defendant, in the hands of Urey Woodson the above named Alien Property Custodian, Garnishee, and served said garnishee with copies of

this Writ, Interrogatories, and the Notices Prescribed by Sections 446 and 456 of the Code. Personally.

June 27th, 1934.

Defendant —— ——.

JOHN B. COLPOYS,
U. S. Marshal in and for the District of Columbia,
By E. CARUSI,
Deputy U. S. Marshal.

K.

30 Supreme Court of the District of Columbia.

Trust No. 39868—Claim 39202—War Claim 3229.

At Law.

No. 84158.

MAX D. ORDMANN, 233 Broadway, New York City, Plaintiff,

vs.

VOGTLANDISCHE MASCHINEN-FABRIK & ALFRED RIETZSCH, as Administrator of Robert Zahn, Dec'd, Otherwise Known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, Dec'd, Plauen, Vogtlandt, Germany, Defendants.

Notice.

To Urey Woodson, Alien Property Custodian, Garnishee:

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

THOMAS E. RHODES,
DEAN HILL STANLEY,
Attorneys for Plaintiff.

Interrogatories.

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between

the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

Answer: No.

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

Answer: As Alien Property Custodian, I had in my charge at the time of the service of the writ of attachment herein, and have now in my charge

Patents Nos. 961830, 995394, 995395.	
Principal cash	$30,147.41
Income cash	9,634.38
Total cash	$39,784.79

which was originally seized by a former Custodian as the property of Robert Zahn, deceased, Reichtsenwalt Rietzel, executor and Vogtlandische Machinen Fabrik.

If, when and as any part of the same may be payable to the said Executor and the Vogtlandische Machinen Fabrik by effective provisions of law, the amount of such property in the Custodian's hands will be subject to a deduction of a general administration fee of 2% of principal and interest thereof.

Under the laws and Executive Orders now in effect no part of said money or property is payable or returnable to the said Executor and the said Vogtlandische Machinen Fabrik.

UREY WOODSON.

Subscribed and sworn to before me this 29th day of June, A. D. 1934.

[NOTARIAL SEAL.] SOPHIE D. FREEMAN,
Notary Public.

31 *Marshal's Return to Summons Issued June 27, 1934.*

The Defendants, Vogtlandische Maschinen Fabrick not to be found July 25, 1934. Alfred Rietzsch not to be found July 25, 1934.

JOHN B. COLPOYS,
U. S. Marshal in and for
the District of Columbia,
By WM. J. KIRKLAND,
Deputy U. S. Marshal.

32 *Order for Publication.*

Filed July 25, 1934.

* * * * * * *

The object of this suit is to recover Six Thousand Five Hundred and eighty-seven Dollars and sixty cents ($6,587.60) for professional services rendered, together with the costs of this action, and to have judgment of condemnation of certain property of the defendant levied on under an attachment issued in this suit to satisfy the plaintiff's claim.

It is, therefore, this 25th day of July, 1934, ordered that the defendant appear in this Court on or before the fortieth day, exclusive of Sundays and legal holidays, after the day of the first publication of this order, to defend this suit and show cause why said condemnation should not be had; otherwise the suit will be proceeded with as in case of default; provided that this order be published in the Washington Law Reporter and the Washington Post once a week for three successive weeks.

By the Court: PEYTON GORDON,
Justice.

33 *Affidavit of Thomas E. Rhodes.*

Filed September 18, 1934.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Thomas E. Rhodes, being first duly sworn, deposes and says:

That he is attorney for the plaintiff in the above-entitled case, and that on August 18, 1934, he personally mailed,

postpaid, a copy of said advertisement (the order of publication entered by this Court in this case on July 25, 1934), a copy of which is attached hereto, made a part hereof, and marked "Exhibit A", to the defendants in the above-entitled case at Plauen, Vogtlandt, Germany, their last known place of residence; that one envelope was addressed to Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Maschinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, Plauen, Vogtlandt, Germany, another envelope addressed to Vogtlandische Maschinen-Fabrik, Plauen, Vogtlandt, Germany,

34 and the third envelope addressed to Mr. Alfred Rietzsch, Administrator or Robert Zahn, deceased, Plauen, Vogtlandt, Germany, each of which contained a copy of said advertisement and each of said letters containing said advertisement was personally mailed by the affiant in the Post Office of Washington, D. C., on August 18, 1934; that said advertisement was first published in The Washington Post on July 26, 1934, and that more than 40 days have expired, Sundays and legal holidays excluded, since said advertisement was first published, and that more than 20 days have expired since the affiant mailed, postpaid, copies of said advertisement to the defendants; and that the defendants have failed to appear in obedience to said notice within the time named therein.

THOMAS E. RHODES.

Subscribed and sworn to before me this the 18th day of September, 1934.

[SEAL.] ELIZABETH G. SOUTTER,
Notary Public, D. C.

My commission expires March 16, 1937.

35 Supreme Court of the District of Columbia.

Tuesday, September 18, 1934.

Session resumed pursuant to adjournment, Hon. Jesse C. Adkins, Justice, presiding.

* * * * * * *

Comes now the plaintiff, by his attorney of record, Thomas E. Rhodes, and, having duly vertified his demand

herein, prays judgment thereon against the defendants, Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, who though duly notified by publication, have not caused their appearance to be entered herein. Wherefore, it is considered that the plaintiff recover against the said defendants' interest in the property attached herein, the sum of Six Thousand Five Hundred Eighty-seven Dollars and Sixty Cents ($6,587.60) with interest thereon from the 18th day of September, 1934, being the money payable by the said defendants to the plaintiff by reason of the premises together with costs of this suit to be taxed by the clerk and have execution thereof.

Thereupon, the plaintiff, by his said attorney, moves for judgment of condemnation against the credits of said defendants attached by the United States Marshal on the 27th day of June, 1934, in the hands of Homer S. Cummings as Attorney General of the United States and as successor to the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law, and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee.

Whereupon, it appearing by the answer of the said garnishee filed herein on June 30, 1934, that he holds in trust for the said defendants, Vogtlandische Maschinen-
36 Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik and Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, cash in the sum of $39,-784.79, and nothing having been shown to the contrary, it is ordered that so much thereof of said sum as may be necessary be condemned in the hands of Homer S. Cummings as Attorney General of the United States and as successor to the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee, toward the satisfaction of the plaintiff's recovery herein and execution thereof be had.

Supreme Court of the District of Columbia.

Thursday, January 9, 1936.

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

At Law.

No. 85,890.

UNITED STATES ex Rel. MAX ORDMANN, Relator,

vs.

HOMER S. CUMMINGS, Attorney General of the United States, Respondent.

Upon consideration of the demurrer filed herein, to the amended answer of respondent, it is ordered that said demurrer be, and the same is hereby overruled.

Further, upon consideration of the motion filed herein, for reargument of the relator's demurrer to the amended answer of the respondent, it is ordered that said motion be, and the same is hereby overruled. Whereupon, the relator elects to stand upon his demurrer to the amended answer, and judgment is accordingly ordered.

37 Wherefore, it is ordered that the petition be, and the same is hereby dismissed and the rule to show cause discharged.

Further, it is considered that the respondent recover of the relator herein his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the relator by his attorney of record, in open Court, notes an appeal to the United States Court of Appeals for the District of Columbia; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit Fifty Dollars ($50.00) cash with the clerk in lieu thereof.

Memorandum.

January 31, 1936.—$50 deposited in lieu of bond on appeal.

38 *Assignments of Error.*

Filed January 31, 1936.

* * * * * * *

Now comes the relator, Max D. Ordmann, by his attorney, and assigns for review to the United States Court of Appeals for the District of Columbia on appeal in the above-entitled case the following errors committed by the trial Court:

1. The court erred in overruling the demurrer of the relator to the amended answer of the respondent.
2. The court erred in not sustaining the demurrer of the relator to the amended answer of the respondent.
3. The court erred in overruling the motion of the relator for a reargument of the relator's demurrer to the amended answer of the respondent.
4. The court erred in dismissing the petition of the relator.
5. The court erred in refusing to grant the relief prayed for in the petition.
6. The court erred in not holding that the relator was entitled to the relief prayed for in his petition.

THOMAS E. RHODES,
Attorney for the Relator.

Service of a copy of the foregoing Assignments of Error acknowledged this 31st day of January, 1936.

LESLIE C. GARNETT,
United States Attorney,
Attorney for the Respondent.

39 *Designation of Record.*

Filed January 31, 1936.

* * * * * * *

The Clerk will please prepare the record on appeal in the above-entitled case and include therein the following papers and proceedings:

1. Petition for writ of mandamus.
2. Rule to show cause.

3. Amended answer of the respondent, excluding the verification of John W. Scott and Edward First, and Exhibits A, B and C, as the Court will take judicial notice of said Exhibits.
4. Demurrer to amended answer.
5. Motion for reargument.
6. Judgment and notation of appeal.
7. Notation of deposit of $50.00 as security for costs on appeal.
8. Assignments of error.
9. This Designation of Record.

And the Clerk will also include in the record on appeal the following papers and proceedings in case At Law No. 84,158:

(1) The Declaration, Affidavit of Merit and Particulars of Demand.
(2) The writ of attachment and the Marshal's return.
(3) The Interrogatories and the return of the Garnishee.
(4) Notation of Marshal's return of summons to defendants.
(5) Order of Publication.
40 (6) Affidavit of Thomas E. Rhodes.
(7) Judgment entered on September 18, 1934.

THOMAS E. RHODES,
Attorney for the Relator,

Service of a copy of the foregoing Designation of Record acknowledged this 31st day of January, 1936.

LESLIE C. GARNETT,
United States Attorney,
Attorney for the Respondent.

41 *Counter Designation of Record.*

Filed February 5, 1936.

* * * * * * *

The defendant does not object to the first nine items which appear upon the plaintiff's designation of record.

The defendant objects to the second part of the plaintiff's designation of record which orders the inclusion of certain papers and proceedings in a case at law, No. 84158. It is suggested that it is improper to include in a transcript of

record matters which have not been made a part of that record, and the defendant suggests that the transcript of record be limited to only those papers and proceedings in the present case, i. e. Law No. 85890.

Respectfully submitted,

JAS. W. MORRIS,
Assistant Attorney General;
LESLIE C. GARNETT,
United States Attorney;
HARRY LEROY JONES,
Attorney, Department of Justice,
Attorneys for the Defendant.

42 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 41, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 85890 at Law, wherein United States ex rel Max D. Ordmann is Relator and Homer S. Cummings, Attorney-General of the United States, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of February, 1936.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6647. U. S. ex rel. Max D. Ordmann, appellant, vs. Homer S. Cummings, Attorney-General of the United States. United States Court of Appeals for the District of Columbia. Filed Feb. 20, 1936. Henry W. Hodges, Clerk.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED APR 9 - 1936

CLERK

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1936.

No. 6647.

SPECIAL CALENDAR.

UNITED STATES *ex rel.* MAX D. ORDMANN,
APPELLANT,

v.

HOMER S. CUMMINGS, Attorney General of the United States, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

THOMAS E. RHODES,
Attorney for the Appellant.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
Charles W. Warden, Washington Representative,
Tower Building.

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IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6647.

UNITED STATES *ex rel.* MAX D. ORDMANN,
APPELLANT,

v.

HOMER S. CUMMINGS, Attorney General of the United States, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

Statement.

This is an appeal from a judgment of the Supreme Court of the District of Columbia entered on January 9, 1936, overruling the demurrer of the appellant (hereinafter referred to as the "relator") to the amended answer of the appellee (hereinafter referred to as the "respondent"), dismissing the relator's petition for a writ of mandamus and discharging the rule to show cause issued thereon. (R. 30.)

The relator is a citizen of the United States and a resident of the State of New York and a member of the bar of that State and engaged in the practice of law in New York City. (R. 2.) The relator was employed by and performed valuable legal services for the Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, citizens of Germany, of Plauen, Vogtlandt, Germany (hereinafter referred to as the "German defendants"), from 1922 until 1934, for which he has never been paid. The said legal services amounted to and were of the value of $6,587.60. The said legal services had been performed and the said sum of $6,587.60 had become due and owing to the relator by said German defendants prior to June 27, 1934. The said German defendants owned 3 patents and many thousands of dollars in cash which were in June, 1934, held by the Alien Property Custodian of the United States. The relator prepared his suit against said German defendants for the sum of $6,587.60 for the said legal services rendered by him, and executed his "Affidavit of Merit and for Attachment Before Judgment" on June 23, 1934 (R. 19-21), and said suit (At Law No. 84,158) was duly filed in the Supreme Court of the District of Columbia on June 27, 1934 (R. 17), on which date the relator obtained a writ of attachment before judgment attaching the money and property of said German defendants in the hands of the Alien Property Custodian in accordance with Section 30 of the Trading with the Enemy Act (c. 167, 45 Stat. 276) and the Code of Laws for the District of Columbia, and said writ of attachment was duly served on the Alien

Property Custodian on said date. (R. 23-25.) On June 30, 1934, the Alien Property Custodian filed his verified answer to the interrogatories attached to said writ of attachment in which he stated that he held three patents (Nos. 961830, 995394 and 995395) and $39,784.79 in cash which was originally seized by a former Alien Property Custodian as the property of said German defendants. (R. 25-26.)

The Marshal's return having been made showing that the German defendants were "not to be found," service of said defendants was duly obtained by publication in accordance with the Code of Laws for the District of Columbia (R. 27), but they never entered any formal appearance in the case. (R. 4.)

On May 1, 1934, the President of the United States signed and issued an Executive Order (No. 6694) entitled "Abolishment of the Office of the Alien Property Custodian and Transfer of its Functions to the Department of Justice," which went into effect on July 1, 1934. The said Executive Order provided that:

> "1. The Office of the Alien Property Custodian is abolished, and the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order are transferred to the Department of Justice, to be administered under the supervision of the Attorney General. * * *
>
> "4. (a) All funds, securities, choses in action, real estate, patents, trade marks, copyrights, and all other property of whatsoever kind, to which the Alien Property Custodian has title or which are in his possession or control, or which are held in trust for the Alien Property Custodian, are hereby transferred to the Attorney General, to be administered and disposed of by him as re-

quired by law. The Alien Property Custodian is hereby authorized and directed to execute all such deeds, conveyances, transfers, assignments, and other documents and to take all such steps as the Attorney General may deem necessary or proper to effectuate the provisions of this order."

By virtue of said Executive order the office of the Alien Property Custodian ceased to exist as a separate office and all of the authority, rights, privileges, powers and duties conferred and imposed on the Alien Property Custodian by law and/or Executive orders were transferred to the Department of Justice to be administered under the supervision of the Attorney General; and all property, real and personal, cash, choses in action, and all other property of whatsoever kind in the possession or under the control of the Alien Property Custodian or which was held in trust for him by the Treasurer of the United States was thereupon transferred to the Attorney General of the United States; and the respondent, Homer S. Cummings, as Attorney General of the United States, is now and has been since July 1, 1934, acting Alien Property Custodian of the United States vested with all of the powers and duties formerly vested in the Alien Property Custodian. *O'Connor v. Rhodes,* 79 F. (2d) 146.

On September 18, 1934, after the German defendants had been duly served and given notice of the suit in accordance with the Code of laws for the District of Columbia and after the expiration of more than 40 days after the first publication of the order for the service of said defendants by publication and after the attorney for the plaintiff (relator) had filed an affi-

davit in said case (At Law No. 84,158) showing that on August 18, 1934, he had mailed, postpaid, a copy of the advertisement of said order of publication to the defendants and each of them at Plauen, Vogtlandt, Germany, their last known place of residence, the plaintiff having verified his demand in said case, thereupon moved the court for judgment against said German defendants and said motion was granted, and the Supreme Court of the District of Columbia thereupon entered a judgment in said case in favor of the relator and against said German defendants in the sum of $6,587.60, with interest thereon from the 18th day of September, 1934, together with costs of said suit in the sum of $57.80. Thereupon, and after the rendition of said judgment, and on September 18, 1934, the relator moved the court for a judgment of condemnation of the property of the defendants attached by the United States Marshal and in the hands of the respondent, Homer S. Cummings, as Attorney General of the United States and as successor to the authority, rights, privileges, powers and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee, and said court thereupon and on said date duly entered a judgment of condemnation, which provides that:

> "Whereupon, it appearing by the answer of the said garnishee filed herein on June 30, 1934, that he holds in trust for the said defendants, Vogtlandische Maschinen-Fabrik and Alfred Rietzsch, as Administrator of Robert Zahn, deceased, otherwise known as Vogtlandische Machinen Fabrik Reichtsenwalt Rietzel, Executor of Robert Zahn, deceased, cash in the sum of $39,784.79, and noth-

> ing having been shown to the contrary, it is ordered that so much thereof of said sum as may be necessary be condemned in the hands of Homer S. Cummings as Attorney General of the United States and as successor to the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or Executive order and as successor to Urey Woodson as Alien Property Custodian, garnishee, toward the satisfaction of the plaintiff's recovery herein and execution thereof be had." (R. 28-29.)

The German defendants never appealed from the said judgment entered against them on September 18, 1934, and the time within which such an appeal might have been taken has long since expired, and they have not paid said judgment or any part thereof. (R. 5.) The respondent, the Attorney General, has not appealed from the said judgment of condemnation, and the time within which such an appeal might have been taken has also long since expired. (R. 5.)

After the entry of said judgment of condemnation and prior to the filing of the petition for writ of mandamus the relator duly demanded of the respondent, Homer S. Cummings, as Attorney General of the United States, that he forthwith pay to the relator the said sum of $6,587.60 with interest thereon from September 18, 1934, together with costs in the sum of $57.80, in accordance with said judgment of condemnation, which demand said respondent refused and continues to refuse. (R. 5.) Thereafter on June 17, 1935, the relator filed a petition for a writ of mandamus in which he set forth the foregoing facts and that the action on the part of the respondent in refusing to pay

said judgment of condemnation "is without justification of law, and that the payment of said judgment of condemnation being merely a ministerial act required of the respondent by law and not necessitating any exercise of discretion, the relator is entitled to the relief" prayed for in said petition; and that prior to the filing of said petition the relator had "exhausted all the remedies open to him to obtain the payment of said judgment of condemnation, and that his demand having been unlawfully and unjustly denied by the respondent, there is no other adequate remedy open to the relator except" the peremptory writ of mandamus. Whereupon the relator prayed for a writ of mandamus directed to the respondent commanding and directing him to forthwith pay to the relator the amount of said judgment, with interest thereon from September 18, 1934, together with costs in the sum of $57.80, and the costs of the present mandamus proceeding. (R. 2-6.) On the same date the court issued a rule to show cause directing the respondent to appear and show cause "why the prayers of said petition should not be granted and a writ of mandamus issued as therein prayed." (R. 7.)

The amended answer of the respondent (R. 8) admits all the material averments of the petition, which material averments show that on September 18, 1934, the court below entered a valid judgment in favor of the relator and against the German defendants in case At Law No. 84,158, and that thereafter and on the same date entered a valid judgment of condemnation of certain funds of the German defendants in the hands of the respondent in the amount necessary to satisfy the

relator's said judgment; that the said judgment debtors have not paid said judgment or any part thereof, and have not appealed therefrom, and that the respondent has not appealed from said judgment of condemnation and that the time for an appeal has expired, and that the relator has duly demanded of the respondent that he pay said judgment of condemnation and that the respondent has refused and continues to refuse to pay said judgment. The respondent in his amended answer contended that the court below was without jurisdiction by reason of the Joint Resolution of June 27, 1934 (Pub. No. 53—73d Congress), 48 Stat. 1267, which he alleges "postpones all payments of money authorized to be made by the Trading with the Enemy Act as amended, whether or not a judgment or decree has been entered with respect thereto." (R. 12.)

The relator filed a demurrer (R. 13) to the amended answer of the respondent in which he contended that said answer was bad in substance for the following reasons: (1) it admitted all the material averments of the petition, (2) that since no motion to vacate the judgment of condemnation was ever filed, and the term at which said judgment was entered having expired, the court had no jurisdiction to vacate such judgment, (3) that the respondent in his answer to the petition for writ of mandamus cannot question or attack the validity of the judgment of condemnation, (4) that the judgment of condemnation condemned certain specific personal property of the German defendants in the hands of the respondent in the amount necessary to satisfy the relator's claim, (5) that even if the re-

spondent could in his said answer attack the validity of said judgment of condemnation the Joint Resolution, approved June 27, 1934 (Pub. 53—73d Congress) has no application to the claim of the relator, a citizen of the United States, and it does not repeal the provisions of Section 30 of the Trading with the Enemy Act, (6) that if the said Joint Resolution should be construed to deprive the relator of the money here sought to be recovered, said Joint Resolution is unconstitutional, null and void and violative of the Fifth Amendment to the Constitution in that (a) it would deprive the relator of property rights vested in him prior to the enactment of said Joint Resolution, (b) it would arbitrarily and capriciously discriminate against the relator and accord to him different treatment from that accorded to other citizens of the United States, (c) it would deprive the relator of his property without due process of law and (d) without just compensation.

Upon the conclusion of the oral argument on the demurrer on December 13, 1935, Mr. Justice Bailey announced that he thought the relator had a good and valid judgment, but that the payment thereof was stopped and prevented at that time by reason of the Joint Resolution of June 27, 1934 (Pub. No. 53—73d Congress), and that he would therefore overrule the demurrer. He apparently based his decision upon his own ruling in dismissing the bill of complaint in the case of *Deutsche Bank und Disconto-Gesellschaft v. Cummings* (No. 6471), which was reversed by this Court on February 17, 1936, in an opinion by Mr. Justice Groner.

On December 18, 1935, the relator filed a motion for reargument of the demurrer on the additional grounds (1) that the explanatory statements of the Committee members in Congress in charge of said Joint Resolution at the time of its passage show conclusively that Congress did not intend for it to apply to, or prohibit the payment of, any judgment entered in favor of a citizen of the United States, (2) that the relator had a vested right for and with respect to the amount contained in his judgment of condemnation prior to the passage of said Joint Resolution of which he could not be deprived by statute, and (3) that if said Joint Resolution is construed to deprive the relator of the money here sought to be recovered said Joint Resolution is unconstitutional, null and void and violative of the Constitution in that it constitutes a complete delegation of legislative power in violation of Article 1, Section 1, of the Constitution. (R. 15-16.) The motion for reargument was denied.

Thereafter on January 9, 1936, the relator electing to stand upon his demurrer, a judgment was entered overruling said demurrer, overruling the motion for reargument, dismissing the petition and discharging the rule to show cause (R. 30), from which an appeal was duly noted (R. 30) and prosecuted to this Court.

ERRORS ASSIGNED.

The errors assigned are as follows:

1. The court erred in overruling the demurrer of the relator to the amended answer of the respondent.

2. The court erred in not sustaining the demurrer of the relator to the amended answer of the respondent.

3. The court erred in overruling the motion of the relator for a reargument of the relator's demurrer to the amended answer of the respondent.

4. The court erred in dismissing the petition of the relator.

5. The court erred in refusing to grant the relief prayed for in the petition.

6. The court erred in not holding that the relator was entitled to the relief prayed for in his petition. (R. 31.)

QUESTION INVOLVED.

The question involved in this case is whether or not an American lawyer and a citizen of the United States, who rendered legal services for certain German citizens prior to June 27, 1934, and has reduced his claim to a judgment in the Supreme Court of the District of Columbia, having attached the money of the German debtors in the hands of the Alien Property Custodian before judgment pursuant to Section 30 of the Trading with the Enemy Act, and having obtained a judgment of condemnation of such money in the hands of Homer S. Cummings, as Attorney General of the United States and acting Alien Property Custodian, in an amount sufficient to satisfy said judgment against said German debtors, is prohibited from collecting said judgment of condemnation by the Joint Resolution, approved June 27, 1934 (Pub. No. 53—73d Congress), 48 Stat. 1267.

STATUTES.

The relator contends that he has a valid judgment of condemnation of the money of his German debtors in the hands of the respondent, which was duly entered pursuant to Section 30 of the Trading with the Enemy Act, c. 167, 45 Stat. 276, which reads as follows:

> "*Any money or other property returnable under subsection (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment in accordance with the provisions of the code of law for the District of Columbia,* as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attachment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding credits in favor of the person entitled to such return to the extent of the value of the money or other property so returnable. *Nothing in this section shall be construed as authorizing the taking of actual possession, by any officer of any court, of any money or other property held by the Alien Property Custodian or by the Treasurer of the United States.*" (Italics supplied.)

The relator further contends that in view of the proviso contained in the last sentence of the above statute, which this Court in *Sutherland v. Kreisch,* 59 App. D. C. 351, 352, said "forbids the actual seizure of any property in the hands of the Custodian" by an officer of the Court, and as the payment of the judgment of condemnation is merely a ministerial act required of the respondent by law and not necessitating any exercise of discretion, he is entitled to a peremp-

tory writ of mandamus compelling the respondent to pay said judgment of condemnation.

The respondent contends that he is not required to pay the relator's judgment of condemnation by reason of the Joint Resolution of June 27, 1934, 48 Stat. 1267, which is as follows:

"JOINT RESOLUTION."

"To amend the Settlement of War Claims Act of 1928, as amended.

"Whereas the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

"Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said (Government) * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *.

"Whereas the treaty between the United States and Germany of August 25, 1921, incorporated said provision of such joint resolution and also provided in article I thereof as follows:

> "Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States; and

"Whereas by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

"Whereas under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichmarks per annum from April 1, 1930, to March 31, 1981; and

"Whereas Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has accordingly failed to make suitable provision for the satisfaction of the said claims against Germany; Now, therefore be it

"*Resolved by the Senate and House of Representatives of the United States of America in*

Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review."

ARGUMENT.

I.

The judgment of condemnation entered on September 18, 1934, in favor of the relator is a final judgment and it cannot now be attacked.

A. Since the Term at which said judgment of condemnation was entered expired on October 1, 1934, and as no motion was ever filed by the respondent to vacate said judgment, and as he took no appeal therefrom, said judgment cannot now be set aside because it has passed beyond the control of the court.

It is but only fair to state that the learned Justice who decided the instant mandamus suit in the court below stated at the time he overruled the relator's demurrer to the amended answer of the respondent that he was of the opinion that the relator had a valid judgment of condemnation and that the respondent could not successfully attack the same, and that he overruled said demurrer on the sole ground that he thought the Joint Resolution of June 27, 1934, prohibited payment at this time.

The authorities clearly support the proposition that the respondent cannot attack said judgment. Law Rule 1 of the Supreme Court of the District of Columbia provides that:

> "The terms of the general term and of each division of the court, including the Probate Court, shall begin on the first Tuesday in January, April, July and October."

The first Tuesday in October, 1934, was October 2. Therefore, the Term at which the judgment of con-

demnation was entered expired on October 1, 1934. It is well established that if the Term at which a judgment was entered has expired and no motion to vacate is filed before such Term expires, the judgment cannot be set aside because it has passed beyond the control of the court. In *Bronson v. Schulten,* 104 U. S. 410, 415, the Supreme Court said:

> "After the Term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that Term, by motion or otherwise, to set aside, modify or correct them."

In *Bank of United States v. Moss,* 6 How. 31, on motion of the defendants at a subsequent term, the trial court vacated a judgment entered in favor of the plaintiff at the preceding term on the ground that the court lacked jurisdiction to enter the same. The Supreme Court reversed the trial court saying (p. 38):

> "The power of the court over the original action itself, or its merits, under the proceeding then existing, had been exhausted—ended. * * *
>
> "This means the power to decide on it, or to change opinions once given, or to make new decisions or alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term is never a sufficient justification for revising and annulling it, at a subsequent term, in this summary way, on motion."

To the same effect are the strong opinions of this Court in *R. L. Polk Co. v. Smolik,* 44 App. D. C. 55, 59, and *Board of Children's Guardians v. Juvenile Court,* 43 App. D. C. 599, 605.

See also *Cameron v. McRoberts,* 3 Wheat. 591; *Sibbald v. United States,* 12 Pet. 488; *Brown v. Aspden,*

14 How. 25; *McMicken v. Perin,* 18 How. 507; *Noonan v. Bradley,* 12 Wall. 121; *Raemer v. Simon,* 91 U. S. 149; *Brooks v. Burlington & S. W. R. Co.,* 102 U. S. 107; *Egan v. Sengpiel,* 46 Wis. 703.

B. In a proceeding for a peremptory writ of mandamus compelling the respondent to pay a final judgment the respondent cannot question or attack the validity of such judgment or the jurisdiction of the court to enter the same.

In *Tucker v. Hubbert,* 196 Fed. 849 (U. S. C. C. A. 6th Cir.), which was a mandamus proceeding to enforce payment of a judgment obtained in a Federal Court, the respondent filed an answer attacking the jurisdiction of the court in entering the judgment, alleging that the plaintiff and defendant were citizens of the same State. A demurrer to the answer was sustained, and the Circuit Court of Appeals affirmed, holding that in a proceeding in a Federal Court for a writ of mandamus to enforce payment of a judgment of such court, the validity of the judgment cannot be drawn in question. The court said (p. 851):

> "It is also sought by the answer to question the validity of the judgment; but nothing that contradicts the judgment can be alleged or regarded in this proceeding. Harshman v. Knox County, 122 U. S. 318."

In *Kail v. Board of Directors,* 194 Fed. 73 (U. S. C. C. A. 5th Cir.), which also was a mandamus proceeding to enforce the payment of a judgment, the court held that the validity of the judgment could not be questioned by the answer of the respondent.

In *Harshman v. Knox County,* 122 U. S. 306, the Supreme Court of the United States in directing that the trial court issue a peremptory writ of mandamus to enforce the payment of a judgment said (pp. 317, 318):

> "As this is a direct proceeding upon the judgment its effect as an estoppel is determined by the first branch of the rule as laid down in *Cromwell v. County of Sac,* 94 U. S. 351, 352. That is: 'It is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' And as stated in *Burlen v. Shannon,* 99 Mass. 200, 203, 'The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded.' It is none the less conclusive because rendered by default. 'The conclusiveness of a judgment upon the rights of the parties does in no wise depend upon its form or upon the fact that the court investigated or decided the legal principles involved; a judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict.' *Gifford v. Thorn,* 9 N. J. Eq. (18 Stockton) 702, 722. The bar is all the more perfect and complete in this proceeding because it is not a new action. Mandamus, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment. *Riggs v. Johnson County,* 6 Wall. 415; *Supervisors v. Durant,* 9 Wall. 166; *Thompson v. United States,* 103 U. S. 480, 484. Certainly nothing that contradicts the record of the judgment can be alleged in a proceeding at law for its collection by execution."

A proceeding to enforce a judgment "is merely auxiliary to the suit at law, and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape it." *Kern v. Huidekoper,* 103 U. S. 494, 498.

II.

The relator had a vested property right which had arisen upon a contract, and which accrued prior to June 27, 1934, to sue and recover the amount contained in his judgment of condemnation. That property right could not be destroyed or impaired by statute.

The relator, an American lawyer, was employed by and performed valuable legal services for the German defendants from 1922 to 1934, and there had accrued and was due and owing to the relator on June 23, 1934, the amount contained in the judgment of condemnation. He therefore had a vested property right prior to the date of the enactment of the Joint Resolution of June 27, 1934, which could not be destroyed or impaired by statute.

From the date of the end of the War on July 2, 1921, the relator was free to contract with the German defendants to perform legal services for them. He was so employed in 1922, and on March 10, 1928, the Settlement of War Claims Act was enacted by Congress, which added a new section to the Trading with the Enemy Act, Section 30, which gave to the relator a specific statutory right to collect his fee, due by the German defendants, by suing such defendants in the Su-

preme Court of the District of Columbia and attaching the property of such defendants in the hands of the Alien Property Custodian, and obtaining a judgment of condemnation of such property. The relator performed his services in reliance upon his rights under that statute, and his right to sue and recover for his legal services and to obtain a judgment of condemnation is a vested property right that cannot be impaired or destroyed. *Steamship Company v. Joliffe*, 2 Wall. 450, 457, 458; *Ettor v. Tacoma*, 228 U. S. 148; *Coombes v. Getz*, 285 U. S. 434, 442; *Pritchard v. Norton*, 106 U. S. 124; *United States v. Cook*, 257 U. S. 528. These cases show that it has been repeatedly held that where one performs service under a statutory right to sue and recover, that right cannot be taken away. In Sutherland on Statutory Construction, Vol. 2 (2d Ed.), p. 1217, the rule is succinctly stated as follows:

> "Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and constitutional limitations upon the exercise of the sovereign powers."

In this connection and by way of illustration of the unconstitutionality of the Joint Resolution of June 27, 1934, as respecting the rights of this relator, the attention of the Court is invited to the decisions of the courts in the so-called *Chemical Foundation patent royalty cases*. There Section 10 (f) of the Trading with the Enemy Act vested in the owner of a patent that was licensed under said Act the right after the end of the war to sue the Government licensee and the Treasurer of the United States to recover a fair roy-

alty for the use of his patent, and to apply the royalty fund paid to the Treasurer of the United States under the Government license in satisfaction of such judgment as might be entered in the case. Congress by Section 19 of the Settlement of War Claims Act attempted to change the rights granted by Section 10 (f). Some of such patents which had been licensed by the Government were seized and later sold to the Chemical Foundation, together with the right to recover royalties. Section 19 of the Settlement of War Claims Act attempted to prohibit such an assignee from recovering royalties under Section 10 (f). The Chemical Foundation's right of recovery was based, as here, upon a contract entered into in reliance upon the statutory grant of a right to sue. The courts held that the Chemical Foundation had a right which could not be taken away by the subsequent statute. The United States District Court for the District of Delaware in *Chemical Foundation v. Du Pont De Nemours & Co.*, 29 F. (2d) 599, 602, said:

> "By virtue of the statute, these orders and assignments the Chemical Foundation became the owner of the choses in action, or right to recover from the defendant the accrued royalties, originally belonging to the German plaintiffs.
>
> "That right is a chose in action. A chose in action is property. The Fifth Amendment to the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, denies to the Congress power to transfer property from one to another directly or indirectly."

That decision was affirmed in *Farbwerke v. Chemical Foundation,* 283 U. S. 152, 163, where the Supreme Court said:

> "Counsel suggests that, although this enactment came along after transfer of the patents and rights incident thereto to the Chemical Foundation, and years after the patent suits began, it authorized the German claimants to recover as if owners according to the terms of the original act and the license of the duPont Company. Manifestly, such an interpretation would give rise to a grave constitutional objection—depriviation of the Chemical Foundation of property without due process."

And finally the decision of this Court on February 17, 1936, in *Deutsche Bank und Disconto-Gesellschaft v. Cummings,* should completely settle this controversy in favor of this relator.

The respondent contended in the court below that the relator could not collect his judgment because his rights were no greater than his German debtors, and that since they could not recover by reason of the Joint Resolution of June 27, 1934, the relator could not collect his judgment of condemnation. That contention is unsound as will hereinafter be shown, but the court below agreed with such contention. Even if the relator's rights were no greater than his German debtors, he would still be entitled to collect his judgment of condemnation from the respondent under the decision of this Court in *Deutsche Bank und Disconto-Gesellschaft v. Cummings* for the reason that the relator's German debtors are entitled to recover their seized property in the hands of the Attorney General.

After the enactment of the Settlement of War Claims Act of March 10, 1928, said German debtors filed a claim (No. 39,202) with the Alien Property Custodian,

and made application to the President for the return of $10,000 of their seized property under the Winslow Amendment to the Trading with the Enemy Act, and also filed a claim (War Claim No. 3229) with the Custodian, and made application to the President for the return of 80 per cent of the balance of their principal and the accrued income therefrom, and filed a written consent for the retention of the remaining 20 per cent in accordance with the requirements of subsection (m) of Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, and said two claims were duly allowed by the Alien Property Custodian on February 7, 1934, (long prior to the enactment of the Joint Resolution of June 27, 1934), and he thereupon certified said claims to the Treasury Department for payment, but the Secretary of the Treasury arbitrarily refused to pay said claims.

The rights of the relator's German debtors, therefore, are on all-fours with the appellant in *Deutsche Bank und Disconto-Gesellschaft v. Cummings,* and the respondent's contention in the court below must fall.

III.

The Joint Resolution of June 27, 1934, is unconstitutional, null and void and violative of the Constitution in that it constitutes a complete delegation of legislative power in violation of Article 1, Section 1, of the Constitution.

Article 1, Section 1, of the Constitution provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, 415, the Supreme Court said:

> "Section 9 (c) does not state whether, or in what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in Sec. 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

In *Schecter v. United States*, 295 U. S. 495, 529, 537, the Supreme Court in holding the N. R. A. unconstitutional said:

> "The Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, Sec. 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. 1, Sec. 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. * * *
>
> "* * * Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

The Joint Resolution provides: *"That the President may, in his sole discretion, remove the restriction*

as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution." That is a complete abdication of legislative power. It sets no standards, fixes no rules when a payment may be made, and it requires no finding by the President. It attempts to give to the President unlimited authority to make a payment in one case, and to deny payment in another case exactly on all fours, or of equal merit. An examination of the Executive Orders of March 2, 1935 (No. 6981) and July 22, 1935 (No. 7111), clearly shows that in the exercise of the alleged power conferred by the Joint Resolution the grossest favoritism has been practiced without any cause whatsoever and without any reason being assigned therefor. Thus in paragraph 4 of the Executive Order of July 22, 1935, the President attempts to deny the right of an American creditor under Section 30 of the Trading with the Enemy Act from recovering a debt due him by a German citizen regardless of the fact that the creditor may be a native-born citizen of the United States, or a naturalized American citizen since prior to the war, but permits the payments of claims of "heirs, devisees, or legatees" of Germans if such claimants have become naturalized as American citizens prior to June 1, 1934. In other words, under the Executive Order of the President, an American lawyer who has earned his fee cannot collect it, but a naturalized citizen who served in the German Army during the war is permitted to recover as an heir of a German! Obviously if said Joint Resolution is held to apply to this relator, then this Court is of necessity compelled to hold that

it is absolutely null and void as violative of Article 1, Section 1, of the Constitution of the United States.

IV.

Even if the Joint Resolution of June 27, 1934, were constitutional, it has no application to the claim of the relator, an American citizen, and said resolution does not repeal the provisions of Section 30 of the Trading with the Enemy Act under which the relator's judgment of condemnation was obtained.

Section 30 of the Trading with the Enemy Act, enacted on March 10, 1928, provides that "any money or other property returnable under subsection (b) or (n) of section 9 *shall, at any time prior to such return be subject to attachment in accordance with the provisions of the code of law for the District of Columbia.*" This is certainly still a "time prior to such return." The property of the German defendants was "returnable" to them under subsection (b) of Section 9 of the Trading with the Enemy Act at the time of the service of the writ of attachment upon the Alien Propery Custodian and it is still "returnable." Section 30 was enacted by and is a part of the Settlement of War Claims Act, and no part of said Act has ever been repealed. The Joint Resolution of June 27, 1934, does not repeal any of the provisions of the Trading with the Enemy Act or the Settlement of War Claims Act, but simply attempts to postpone payments to Germans so long as Germany is in arrears under the debt-funding agreement. The Joint Resolution has reference only to payments to the Germans and clearly refers only to judgments or decrees entered in equity pursuant to Section

9 of the Trading with the Enemy Act in favor of German plaintiffs. If Congress had intended to repeal the provisions of Section 30 with respect to the rights of American creditors it would have done so by specifically providing for the repeal of said Section or the limitation of the rights of plaintiffs proceeding under that section. A review of the committee reports on, and the explanatory statements of the committee members in Congress in Charge of, said Joint Resolution just prior to its passage show conclusively that Congress never intended to prohibit the payment of any judgment of condemnation entered in favor of an American creditor.

In the report of the Ways and Means Committee (House Report No. 1924, 73d Cong. 2nd Sess.) of the Joint Resolution to the House of Representatives, dated June 4, 1934, it was stated that—

> "Germany is now in arrears on the payments due under the debt agreement of June 23, 1930, and there is no assurance when those arrears will be discharged or further annual payments made. It is not felt that this Government should make further payments to German nationals from the limited funds that may be available in the German special-deposit account, or that it should return the small amount of property still held by the Alien Property Custodian while Germany's obligations under the debt agreement remain in their present state."

When the Joint Resolution, approved June 27, 1934, was presented to and passed the House of Representatives (Cong. Record, vol. 78, Part 10, 73d Cong., 2nd Sess., pp. 1416-1417), the following discussion was had thereon:

"MR. COOPER of Tennessee. Mr. Speaker, I ask unanimous consent for the present consideration of House Joint Resolution 365, to amend the Settlement of War Claims Act of 1928, as amended. (Then there followed a copy of the Joint Resolution.)

"THE SPEAKER. Is there objection?

"MR. JENKINS of Ohio. Reserving the right to object, I want to ask the gentleman if this is a unanimous report from the Ways and Means Committee?

"MR. COOPER of Tennessee. This is one bill I feel confident that there would not be a voice in the entire House raised against its passage. It comes with a unanimous report from the Committee on Ways and Means. In a word, it means that out of the funds held in the Treasury Department for claims for the people of Germany shall be held until they make proper provision for the payment of claims of American nationals.

"MR. JENKINS. I withdraw my reservation of objection.

"The Committee amendments were agreed to."

In the report of the Senate Finance Committee of said Joint Resolution to the Senate, dated June 6, 1934 (Senate Report No. 1376, 73d Cong., 2nd Sess.), it was stated that—

"The result is that while the United States has fulfilled its undertakings, Germany has failed to make suitable provision for the satisfaction of the claims of the United States and its nationals called for in the Knox-Porter peace resolution. Under these circumstances it would appear to be in accord with the policy of the Congress as declared in that resolution to postpone any further liquidation of the claims of German nationals against the United States until the German Government fulfills its undertakings to provide for satisfaction of the claims of American nationals against it. The resolution reported is designed to carry out this policy."

When said resolution reached the Senate (Cong. Record, vol. 78, Part 11, 73d Cong., 2nd Sess., pp. 12067-12068) the following discussion was had thereon:

"MR. HARRISON. Mr. President, this is a bill the purpose of which is to hold in the Treasury some $20,000,000 which is there under the mixed claims award against German nationals. *It does not interfere with any payment being made to any American citizen who may have a judgment* or who may have been awarded anything by the Mixed Claims Commission, but it does withhold in the Treasury the money that might be awarded to German nationals, and that is due to the fact that our Government has advanced about $86,000,000, and that Germany has not come across with the part she was to pay our citizens.

"MR. FESS. May I ask whether it is the same bill as No. 1468 on the calendar?

MR. HARRISON. It is the same bill which was reported favorably by the Senate Committee.

"MR. FESS. *There was one item in that bill which goes to the extent of withholding payment where judgments have already been rendered. Has the Senator taken that into consideration?*

"MR. HARRISON. *Yes. The bill provides for withholding for the time being, in the discretion of the President, payments of judgments or awards which may have been made to German nationals,* because of the failure of Germany to comply in advancing money that she was under agreement to advance to pay off American citizens.

* * * * *

"MR. JOHNSON. It is a reprisal for the failure of Germany to pay Germany's obligation to this Government.

"MR. HARRISON. I would not say it is a reprisal, but it is because of the failure of Germany to live up to her agreement in providing funds under the agreement that it is proposed that we withhold any payment to German nationals until after compliance shall have been made by Germany."

Mr. Cooper of Tennessee had charge of the resolution when it was in course of passage in the House of Representatives, and Senator Harrison, Chairman of the Senate Finance Committee, had charge of said resolution when it was in course of passage in the Senate.

These reports and the explanatory statements of the committee members in charge of the Joint Resolution clearly show that Congress passed said resolution postponing further payments to German nationals only for the reason that the German Government had not lived up to its obligations in satisfying the claims of American nationals against Germany. Certainly this cannot, under any theory of statutory construction, be construed as a determination by Congress that American claims against German nationals should not be paid. Congress certainly cannot be presumed to have denied the right of American creditors while at the very same time denouncing the German Government for doing the same thing. The actual intention of Congress was as expressed in the explanatory statement of Senator Harrison, that the Joint Resolution "*does not interfere with any payment being made to any American citizen who may have a judgment,*" but its purpose was simply to withhold "payments of judgments or awards which may have been made to German nationals." In *Duplex Co. v. Deering,* 254 U. S. 443, 474, the Court said:

> "But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. * * * And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage."

Section 30 of the Trading with the Enemy Act is a special statute enacted primarily for the benefit of American creditors of German debtors. It supersedes Section 9 (a) of said Act, which permitted the recovery of debts due American citizens from German citizens by suits in equity. *Sutherland v. Kreisch,* 59 App. D. C. 351. In *Sprunt v. Direction Der Disconto Gesellschaft,* 61 App. D. C. 350, 352, this Court in discussing the provisions of Section 30 said:

> "We think * * * that in the enactment of section 30 Congress intended to establish an entirely new policy in relation to the disposition of enemy property in the hands of the Alien Property Custodian, with the object primarily of providing ways and means to American creditors of enemy nationals for the collection of their debts."

The purpose of Congress from the beginning has been *"to prevent or lessen losses and inconveniences liable to result to non-enemy persons"* and the Supreme Court has held that the provisions of the Trading with the Enemy Act relating to the rights of American creditors are *"highly remedial and should be liberally construed to effect the purpose of Congress and to give remedy in all cases intended to be covered,"* and that the just purpose of the law *"is not to be defeated by a narrow interpretation. Miller v. Robertson,* 266 U. S. 243.

The Joint Resolution of June 27, 1934, contains no direct repeal of the rights granted to American creditors by the special provisions contained in Section 30 of the Trading with the Enemy act, enacted on March 10, 1928. The Joint Resolution, therefore, must *"be read in the light of the purpose it was intended to sub-*

serve and the history of its origin'' (United States v. Louisville & Nashville R. R. Co., 236 U. S. 318, 335), which as Senator Harrison, Chairman of the Senate Finance Committee, said *''does not interfere with any payment being made to any American citizen who may have a judgment,''* but simply withholds *''payments of judgments or awards which may have been made to German nationals.''*

The general provisions of the Joint Resolution cannot be construed as impliedly repealing the special provisions of Section 30. In *Rodgers v. United States,* 185 U. S. 83, 87, the Supreme Court said:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.''

See also Lewis' Sutherland on Statutory Construction, Vol. 1, Secs. 274, 275, pp. 526-531; *United States v. Claflin,* 97 U. S. 546; *Ex parte Crow Dog,* 109 U. S. 556, 570-571; *Washington v. Miller,* 235 U. S. 422, 428; *Simon v. Simon,* 58 App. D. C. 158, 160; *U. S. ex rel. I. G. Farbenindustrie Aktiengesellschaft v. Burnet,* 62 App. D. C. 107.

As hereinbefore shown, the relator had a vested property right prior to the enactment of the Joint Resolution of June 27, 1934, which could not be destroyed or impaired. And in this connection the Court's attention is called to the decision of the Supreme Court of November 11, 1935, in *Becker Steel Co. v. Cummings*, 80 L. Ed. 35, 39, where the Court, in upholding the right of an American citizen to prosecute a claim against the Attorney General as acting Alien Property Custodian, said:

> "Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the Government granted in recognition of an obligation imposed by the Constitution. See *Lynch v. United States*, 292 U. S. 571, 586, 587; *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489."

Therefore, it is respectfully submitted that it is absolutely clear that even if the Joint Resolution of June 27, 1934, was constitutional, it does not repeal the rights granted to American creditors under Section 30 of the Trading with the Enemy Act, and consequently is no bar to this relator, a citizen of the United States, recovering the indebtedness due him by the German defendants.

V.

Mandamus is the proper remedy.

The respondent contended in his amended answer that mandamus is not the proper remedy (R. 12), but that contention was apparently abandoned in the lower court. That contention is absolutely untenable and contrary to the settled law of this jurisdiction. Since

the respondent holds the fund against which the relator has a judgment of condemnation, the relator is clearly entitled to proceed by mandamus to enforce the payment of his judgment. *Harshman v. Knox County,* 122 U. S. 306; *Parish v. MacVeagh,* 214 U. S. 124; *Houston v. Ormes,* 252 U. S. 469, 472; *Miguel v. McCarl,* 291 U. S. 442, 454; *Cortelyou v. U. S. ex rel. Thorpe,* 32 App. D. C. 20; *Miller v. U. S. ex rel. New Process Metals Co.,* 53 App. D. C. 80; *Tucker v. Hubbert,* 196 Fed. 849; *Kail v. Board of Directors,* 194 Fed. 73. Furthermore, a writ of mandamus is the only way by which this relator may enforce the payment of his judgment of condemnation. *Kreisch v. Sutherland,* 59 App. D. C. 351, 352.

The further contention of the respondent that this proceeding is essentially an action against the United States and, therefore, cannot be maintained, is clearly erroneous. That contention apparently was also abandoned in the court below. It is settled law that a proceeding in mandamus to compel an officer of the United States to pay a judgment of a court out of a fund held by such officer is not a suit against the United States *(Houston v. Ormes, supra; Parish v. MacVeagh, supra; Miguel v. McCarl, supra),* but it is *"in substance, a personal action"* against a public officer *"to compel the performance of a duty resting upon the person to whom the writ is sent" (U. S. ex rel. Lewis v. Boutwell,* 17 Wall. 604, 607).

A number of other objections were raised in the respondent's amended answer, which are without merit,

and which apparently were abandoned in the lower court. However, for fear that the respondent will again raise them in this Court the appellant will briefly discuss them.

The contention of the respondent that the attached property of the German debtors constitutes credits that are not due and payable is completely answered in Point II of this brief. Furthermore, the writ of attachment did not attach credits, but attached specific personal property of the German debtors in the hands of the Alien Property Custodian, namely, 3 Patents and $39,784.79 in cash, which had been seized "as the property" of said German debtors. Section 464 of the District Code provides for a judgment of condemnation of the property attached before judgment in the hands of a garnishee, after judgment has first been rendered against the defendant. Section 466 of the Code provides that—"If, in any form of action, specific property has been attached and remains under the control of the court, judgment of condemnation shall be entered". The Court below complied literally with every requirement of the Code in the rendition and entry of the judgment of condemnation. Section 467 of the Code, referred to by the respondent, has no application to this case, because that Section of the Code applies to the case of a judgment of condemnation of a debt due by the garnishee to the judgment debtor.

Likewise the contention of the respondent that the writ of attachment served on the Alien Property Custodian does not continue to attach the funds after their transfer to the Attorney General is clearly wrong.

Since all of the duties of the Alien Property Custodian were by the Executive Order of May 1, 1934 (No. 6694), transferred to the Attorney General effective July 1, 1934, it was unnecessary to serve a new attachment and new interrogatories upon the Attorney General, because he is the acting Alien Property Custodian *(O'Conner v. Rhodes,* 79 F. (2d) 146; *Becker Steel Co. v. Cummings,* 80 L. Ed. 35), and it was unnecessary to substitute him by name as garnishee before the time of the judgment of condemnation. The substitution Act of February 13, 1925, c. 229, 43 Stat. 936, applies only as stated therein to suits "brought by or against an officer of the United States". The relator's suit in which he recovered his judgment was not against an officer of the United States, but against certain German citizens. The judgment of condemnation is not a suit against an officer of the United States, but is merely a condemnation of specific property of private persons which happens to be held by a public official. Furthermore, if any order of substitution had been necessary, that was in effect made by the judgment of condemnation which condemns specific funds "in the hands of Homer S. Cummings as Attorney General of the United States".

The respondent received legal notice both in fact and in law of the rendition and entry of the judgment of condemnation. 34 Corpus Juris 49-50, 61, 96; *Curry v. Lehman,* 55 Fla. 847; *Johnson v. Hess,* 126 Ind. 298, 309; *Citizens Bank v. Manoni,* 76 Va. 802, 807; *In Re Cook,* 77 Calif. 220, 230; *Jenkins Lumber Co. v. Cramer,* 182 Iowa 161; *Taylor v. Charter Oak Life Ins. Co.,* 17 Fed. 566, 568; *Egan v. Sengpiel,* 46 Wis. 703.

The relator is entitled not only to a reversal of the judgment of the court below, but is also entitled to the recovery of his costs in the present mandamus proceeding. *Roberts v. U. S. ex rel. Valentine,* 13 App. D. C. 38; affirmed in 176 U. S. 221; *U. S. ex rel. McBride v. Shurz,* 102 U. S. 378, 407; *Dougherty v. U. S. ex rel. Roberts,* 58 App. D. C. 308; *McAskill v. Terrell,* 113 Tex. 500, 506.

Conclusion.

It is therefore respectfully submitted that the judgment of the court below should be reversed with the direction that a peremptory writ of mandamus be issued forthwith commanding and directing the respondent to forthwith pay to the relator the sum of $6,587.60 with interest thereon from September 18, 1934, and the costs in the former action in the sum of $57.80, together with the costs of the present action.

Respectfully submitted,

THOMAS E. RHODES,
Attorney for the Appellant.

FOR MR. JUSTICE VAN DEVANTER.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED MAY 6 - 1936
Monroe Parker
CLERK

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6647

UNITED STATES EX REL. MAX D. ORDMANN, *Appellant*,

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*.

BRIEF FOR THE APPELLEE

JAMES W. MORRIS,
Assistant Attorney General,

HARRY LEROY JONES,
EDWARD FIRST,
Attorneys, Department of Justice,

Attorneys for Appellee.

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In The

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

United States ex rel. Max D. Ordmann,
Appellant,
v.
Homer S. Cummings, Attorney General of the United States,
Appellee.
No. 6647

BRIEF FOR THE APPELLEE.

STATEMENT OF FACTS.

The appellant has stated many facts in his brief which are not to be found in his original petition for a writ of mandamus or in the appellee's amended answer thereto. The pertinent facts which are properly alleged and appear in the Transcript or of which this Court will take judicial notice, are as follows:

The Settlement of War Claims Act of 1928 (45 Stat. 254) amended the Trading with the Enemy Act, *inter alia,* by adding thereto a new section numbered 30. (Appellant's brief, p. 12.) In substance that section provided that any money or other property returnable to the original owners under previous sections of the Act was thereafter subject to attachment by any creditor in accordance with the provisions of the Code of Laws for the District of Columbia, but that nothing

should be deemed to authorize the taking of actual possession, by any officer of any money or property held by the Custodian or the Treasurer of the United States.

On June 27, 1934, the President approved Public Resolution 53, 73rd Congress (48 Stat. 1267) (Appellant's brief, p. 13), which provided:

> "That so long as Germany is in arrears in any payments * * * under the Debt Funding Agreement between Germany and the United States dated June 23, 1930 * * * all payments, conveyances, transfers or deliveries of money * * * authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto shall be postponed * * *.
>
> * * * *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review."

On the same day that this resolution became law, the appellant instituted an action at law in the Supreme Court of the District of Columbia against certain German debtors (Vogtlandische Maschinen-Fabrik et al., At Law No. 84158) and thereafter, upon the same day, a writ of attachment and interrogatories under §§121-123 of Chapter 6, Title 24 of the District of Columbia Code were served upon the then Alien Property Custodian, Urey Woodson, as garnishee. (R. 3.) These

interrogatories were answered on June 30, 1934, and it was stated therein that:

> "As Alien Property Custodian, I had in my charge at the time of the service of the writ of attachment herein, and have now in my charge
>
> Patents Nos. 961830, 995394, 995395.
>
Principal cash	$30,147.41
Income cash	9,634.38
Total cash	$39,784.79
>
> which was originally seized by a former Custodian as the property of Robert Zahn, deceased, Reichtsenwalt Rietzel, executor and Vogtlandische Machinen Fabrik.
>
> "If when and as any part of the same may be payable to the said Executor and the Vogtlandische Machinen Fabrik by effective provisions of law, the amount of such property in the Custodian's hands will be subject to a deduction of a general administration fee of 2% of principal and interest thereof.
>
> "Under the laws and Executive Orders now in effect no part of said money or property is payable or returnable to the said Executor and the said Vogtlandische Machinen Fabrik."

The office of the Alien Property Custodian was abolished by Executive Order No. 6694 promulgated by the President on May 1, 1934, and the authority, rights, privileges, powers and duties theretofore imposed on the Alien Property Custodian transferred to the Attorney General, the abolishment of the office of the Alien Property Custodian becoming effective sixty-one calendar days after the transmission of the order to the Congress on the date of its issuance, May 1, 1934.

In the action at law a judgment by default was entered on September 18, 1934, in favor of the creditor and against the German debtors in the sum of

$6,587.60 with interest and costs, and on the same day a "judgment" of condemnation purporting to be under §30 of the Trading with the Enemy Act was entered against Homer S. Cummings as Attorney General and as successor to the office and functions of the Alien Property Custodian (R. 4, 5), the appellee herein. The Attorney General had never been officially substituted as a party garnishee under the Substitution Act of February 13, 1925 (43 Stat. 936), nor had any additional attachment under §124 of Chapter 6, Title 24, of the District of Columbia Code been issued against him, nor had he otherwise been made a party to the action at law or the attachment proceedings, or otherwise given notice of the pendency of the proceedings. (R. 12.) Thereafter, and under date of November 10, 1934, the attorney for the creditor (appellant herein) addressed a letter to the Attorney General demanding payment of the "judgment" of condemnation. (R. 11.) This letter was the first notice received by the Attorney General or anyone in the Department of Justice authorized to receive notice or to act in such matters on behalf of the Attorney General. This notice was received after the term of court in which the purported judgment of condemnation had been entered had expired. (R. 10, 11.) The demand for payment of the judgment was refused.

The President has never lifted the restrictions of Public Resolution 53 as to the German debtor-defendants in the action at law nor as to any class of claimants including said German debtor-defendants, nor as to the condemnation judgment, nor as to any class of creditors including the judgment creditor.

On June 17, 1935, the appellant filed a petition for a writ of mandamus to compel the payment of the condemnation "judgment" and on the same date a rule to show cause was issued. To the amended answer of Homer S. Cummings, the appellant filed a demurrer.

(R. 13.) This demurrer was overruled and a motion for reargument was also denied. The appellant elected to stand upon his demurrer and the petition was thereupon dismissed and the rule to show cause discharged.

ARGUMENT.

Preliminary Statement.

The argument of the respondent-appellee will be directed primarily to establish the proposition that the extraordinary legal remedy of mandamus is not available to compel a federal officer to do an act which the Congress has expressly prescribed should not be done; and that the writ will never be issued, in any case against a subordinate compelling him to do an act which he has no authority to do, or which his superior has forbidden him to do; that in the instant case the relator is attempting to invoke the prerogative writ as a writ of right to compel the doing of an act not only which is not a ministerial act but which the respondent can not even do as a matter of discretion.

The defense of the respondent to the relator's petition for a writ of mandamus below was primarily predicated upon the basic proposition that Public Resolution 53, 73rd Congress (48 Stat. 1267) directed the postponement of returns of German-owned property and removed the consent of the United States to be sued by a German national for the return of property seized under the Trading with the Enemy Act. It was assumed, of course, that this resolution was constitutional. On February 17, 1936, in the case of *Deutsche Bank und Disconto-Gesellschaft* v. *Homer S. Cummings and W. A. Julian* (No. 6471), this Court denied the correctness of this assumption, and upon motion for reargument the appellees therein were permitted to file

a printed argument. The matter is now, at the time this brief is being sent to the printer, pending before the Court upon the Government's motion for reargument.

On April 25, 1936, the respondent-appellee herein filed a motion with the Clerk of this Court, stating what has been said with reference to the *Deutsche Bank* case and moved to extend the time within which to file this brief until twenty days after the mandate of this Court in the *Deutsche Bank* case was issued to the lower court, or in the event of a review by the Supreme Court of the United States, until twenty days after a decision was rendered by that Court. On April 27, 1936, this motion was denied.

While a final decision of this Court or of the Supreme Court affirming the decree of the trial court in the *Deutsche Bank* case would make it entirely unnecessary to present some of the arguments herein, the appellee desires to state his position at the outset that irrespective of the nature of the final decision in that case, no peremptory writ of mandamus should issue against him to compel compliance with the demand for payment contained in the letter of the relator's attorney of November 10, 1934 (R. 10, Par. 9) because the question of his official discretion, and of his power and duty to comply with the demand must be determined *as of that date,* not as of some date subsequent thereto nor in the light of events which the respondent could not reasonably have foreseen at the time of this demand.

QUESTIONS INVOLVED.

1. Is a writ of mandamus an appropriate and available remedy to compel the Attorney General as successor in interest to the Alien Property Custodian, and as agent and subordinate of the President under the

provisions of the Trading with the Enemy Act, to pay a condemnation judgment entered under §30 of the Act when the Congress has enacted that "all payments * * * whether or not a judgment or decree has been entered * * * shall be postponed and the money * * * reserved * * * Provided * * * That the President may, in his sole discretion, remove the restriction as to any cases or classes of cases * * *" when the President has not removed the restriction as to the German debtor-defendants, nor as to the condemnation judgment itself nor as to any class of creditors including the relator?

2. Is a condemnation judgment entered under §30 of the Trading with the Enemy Act, and the Code of Laws for the District of Columbia, against the Attorney General as successor in interest to the Alien Property Custodian, a valid and subsisting judgment where notice and the writ of attachment were served on his predecessor in office, Urey Woodson, Alien Property Custodian, no writ or alias writ of attachment having been served on the Attorney General, as successor in office to the said Woodson, no substitution of his name for that of Woodson having been made under the Substitution Act of February 13, 1925 (43 Stat. 936), and no notice having otherwise been given the Attorney General of the pendency of the law proceedings, until after the lapse of the term in which the condemnation judgment was entered against him as successor to the attachment garnishee?

3. Where Congress has removed the consent of the United States to be sued by German nationals for the return of property seized under the Trading with the Enemy Act, and has directed the postponement of all payments and returns to such German nationals, does the Supreme Court of the District of Columbia never-

theless have jurisdiction to entertain an attachment action by an American creditor under §30 of said Act upon a debt owing by German enemy nationals?

4. Where a citizen of the United States is a creditor of a citizen of Germany, do the rights of that creditor rise higher than the rights of his debtor with respect to property of the debtor seized under the Trading with the Enemy Act and held by the Alien Property Custodian?

I.

MANDAMUS IS NOT AN APPROPRIATE AND AVAILABLE REMEDY.

The first question to be resolved in this, as in any application for a writ of mandamus against a federal officer, is whether the act sought to be enjoined is within the power of the officer against whom it is proposed to direct the writ, and whether, if so, the act would be purely ministerial, or, on the other hand, would involve the exercise of his official discretion and judgment. The appellant's brief contains no argument whatsoever upon this fundamental problem.

A. The Mandate of Public Resolution 53 Is Directed to the President, and the Respondent, as His Agent, Has no Authority to Pay the Judgment, and Is Forbidden to Pay It.

The Attorney General, as successor in interest to the Alien Property Custodian, is not vested with any power or authority under the Trading with the Enemy Act in his own right. He is merely the holding and managing agent for the President. It is the President himself who is invested with the primary power

and authority to administer the Act. See §§2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 19, 20, 21, 23. This power is conferred upon the President as the Commander-in-Chief, as the repository under the Constitution of control over international relations[1] and as the exclusive recipient of such powers over international relations as the legislative branch may bestow upon the executive branch of the Government. (*Cf. Stoehr* v. *Wallace,* 255 U. S. 239; *Chemical Foundation* v. *United States,* 272 U. S. 1; *in re Garvan,* 270 Fed. 1002.) Section 6 provides for an Alien Property Custodian to act as an agent of the President:

> "The President is authorized to appoint, *prescribe the duties of,* and fix the salary (not to exceed $5,000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same *under the general direction of the President* and as provided in this Act. * * *" (50 U. S. C. A. Appendix §6.)

Thus the primary mandate of the Congress in all matters respecting alien property under administration is directed to the President. The Congress has expressly reposed the exclusive administrative or quasi-judicial function of returning enemy property in the President alone. Section 9 (b) provides that if the President shall make the appropriate determinations of ownership and citizenship or other qualification of the claimants according to the twenty-two various

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[1] Constitution, Art. II, Sections 1, 2 and 3. See CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS, p. 2.

classes thereof, "Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled * * *." The only power or authority which may be exercised by the Alien Property Custodian or his successor in interest is that which, from time to time, may be conferred upon him by the President. The Alien Property Custodian has been authorized to pass upon a limited class of claims only and can make no returns of property or order any payments of money other than as specifically authorized. See Executive Order No. 4862, dated April 23, 1928. The authority of the Alien Property Custodian as to any class of claims may, of course, be changed or completely revoked at the pleasure of the Executive.

Accordingly, when in Public Resolution 53 the Congress enacted that "all payments, conveyances, transfers or deliveries of money or property * * * whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property or the income, issues, profits, and/or avails thereof reserved" the mandate of the Congress was addressed to the President, and to the appellee only in so far as he may be specifically authorized by the President to act with respect to the return of enemy property. Public Resolution 53 must be deemed to annul any authority which may have been bestowed by Congress upon the President and by the President upon the Alien Property Custodian to return enemy property to German nationals, or to any creditor of a German national.

That the actual payment of the judgment held by this appellant was prohibited and enjoined by Congress is apparent when we look at the specific language of Public Resolution 53. The appellant urges that this resolution should not be construed so as to apply to an American citizen. It is to be noted, however, that the resolution itself makes no distinction between individuals, but instead applies to "*all* payments" which were "authorized" by the Act, "whether or not a judgment or decree had been entered with respect thereto." Th appellant herein seeks a payment which was formerly "authorized" by the Act, and such a payment by its very definition falls within the prohibition of the resolution. Reference is made by the appellant (p. 30) to a discussion by Senator Harrison in which the Senator stated that the proposed resolution did not interfere with any payment of judgments held by an American citizen. An examination of the full statement of the Senator reveals that he had in mind the judgments of the Mixed Claims Commission and not judgments under Section 30 (Appellant's Brief, page 30). But more important, it must be noted that where an Act of Congress is expressed in unambiguous terms, then it is highly improper to resort to committee reports or to the discussion of the proposed act by members of the legislature. The words in Public Resolution 53 are plain; they give meaning to the Act, and it is neither the duty nor the privilege of a court to enter speculative fields in search of a different meaning. As stated by the Supreme Court of the United States in the well known case of *Caminetti* v. *United States,* 242 U. S. 470:

> "It is true that §8 of the act provides that it shall be known and referred to as the 'White-slave traffic Act,' and the report accompanying

> the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning."

The President, by Executive Orders No. 6981 and No. 7111 (Appendices A and B), has removed the restrictions of Public Resolution 53 in certain cases, but not as to any case or class of cases which would empower the Attorney General to authorize payment of the relator's judgment. Public Resolution 53 and these Orders thereunder, are likewise tantamount to an order by the President to the respondent not to pay judgments of the class obtained by the relator.

If this were an equity suit, any decree directing a return of the property, addressed to this appellee, in this view of the case, would be directing him as agent, to do an act forbidden by his principal. It is fundamental that where the Congress reposes the power and responsibility of performing a governmental function in a specifically named officer, a court can not control that performance by a decree addressed to a subordinate. In *Webster* v. *Fall,* 266 U. S. 507, a case in which it was sought to compel two subordinates of the Secretary of the Interior to pay certain moneys to the plaintiffs, the Supreme Court stated:

> "But the suit was one which required the pres-

> ence of the Secretary, and the bill should have been dismissed for want of a necessary party. Gnerich v. Rutter, 265 U. S. 388, 68 L. ed. 1068, 44 Sup. Ct. Rep. 532; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 34, 41 L. ed. 621, 623, 17 Sup. Ct. Rep. 225. *The statutory direction to cause quarterly payments to be made* (subject to §2087) *is addressed to the Secretary. The power and responsibility are his.* Neither Wright nor Wise have any primary authority in the matter. *They can act only under, and in virtue of, the Secretary's general or special direction.* In the absence of it, no payments or disbursements properly can be made. Authority in the superintendent to supervise such payments is not authority to cause them to be made. The statement of this court in the Gnerich Case (p. 391) is pertinent here: 'They act under his direction, and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied.' " (p. 510.) (Italics supplied.)

The principle of *Webster* v. *Fall* is equally applicable to the instant case. The Attorney General can act only under, and in virtue of, the President's "general or specific direction." "The power and responsibility" are the President's.

These principles are even more applicable in mandamus than in equity cases. In *Butterworth* v. *United States,* 112 U. S. 50, the Supreme Court said, at page 54:

> "It is clear enough that if the action of the Commissioner of Patents, in the matter of controversy, is subject to the order of the Secretary of the Interior, the judgment of the Supreme Court of the District of Columbia must be reversed; for *mandamus* evidently will not lie to compel a public

> officer to do a particular thing which his superior in authority has lawfully ordered him not to do."

Conceivably, the President could, tomorrow, divest the Attorney General of all his functions as successor in interest to the Alien Property Custodian and place them upon, say, for example, the shoulders of the Secretary of State. Surely it could not be said that the Attorney General, as successor in interest to the Alien Property Custodian, is any less the agent of the President under the Trading with the Enemy Act than is the Secretary of State under R. S. 202. (5USCA §156.) In *Holzendorf* v. *Hay,* 20 App. Cas. 576, an action to mandamus the Secretary, this Court has said:

> "The latter is the confidential, political agent of the President for the execution of his will in matters committed to his discretion by the Constitution. To coerce the action of the Secretary, therefore, is to attempt the coercion of the President; and, as was said in *Marbury* v. *Madison* (1 Cr. 137, 166): 'Nothing can be more perfectly clear than that their acts are only politically examinable.' " (p. 581.)

It has thus long since been established that neither mandamus, injunction or other court process will issue against the President. *Marbury* v. *Madison,* 1 Cr. 137, 166; *Mississippi* v. *Johnson,* 4 Wall. 475. Since the President, an indispensable party to any action beyond the purview of §9 of the Act, could not be joined as a defendant, it is submitted that the court should not direct a writ against his subordinate.

In the instant case, we can not deem the consent to sue the agents of the President embodied in §9 (a), and (c), in an equity action, as a consent to invoke the prerogative writ of mandamus against his agent to com-

pel him to perform an act contrary to the mandate of the Congress and forbidden by the President. The relator's application thus runs counter to the well established canon of the law of extraordinary legal remedies: that a writ of mandamus will not issue against a public official if there is any question of the authority of that official to perform the act sought to be enjoined. This aspect of the law is succinctly summarized in the recent case of *U. S. ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission,* 294 U. S. 50 (1935) where the Court in an opinion by Mr. Justice Roberts states:

> "The ultimate question, then, upon the answer to which the decision of this case must turn, is whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue. It is to be noted that the solution of this question does not depend upon whether in a proper case this court would reach the same conclusion as that of the Commission. * * *
>
> * * * its conclusion was not so clearly erroneous as to call for the exercise of the extraordinary power involved in the issuance of mandamus. Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body."[2]

The relator in the instant case must fail because the President has not empowered the appellee to do the act sought to be coerced, and the President's discretion in the matter of lifting or failing to lift the restrictions of Public Resolution 53 may not be reviewed.

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[2] Citing a long line of cases beginning with *Reeside* v. *Walker,* 11 How. 272, and ending with *Interstate Com. Com.* v. *N. Y. N. H. & H. R. Co.,* 287 U. S. 178.

B. Payment of a Judgment Which Is Forbidden by the Congress and Unauthorized by the President and Which Is Deemed Null and Void by the Respondent Attorney General Would Not Be a Ministerial Act.

But assuming, arguendo, that the appellee as successor in interest to the Alien Property Custodian were invested with all primary power and responsibility under the Trading with the Enemy Act, and that the Congress had empowered him (instead of the President), in his sole discretion to lift the restrictions of Public Resolution 53 and he had not done so, nevertheless, his action in conforming to the mandate of the Congress could not be restrained by a writ of mandamus.

Assiduous research has failed to disclose a single case where a writ of mandamus has ever been granted to compel a federal officer to do an act contrary to an express provision of the law. Nor does the appellant go so far in his brief as to suggest that any case has ever arisen where the Supreme Court of the District of Columbia, the only court in the United States having jurisdiction of actions of mandamus against federal officers, has been importuned to issue a writ under such circumstances.

The writ of mandamus is not a writ of right and the cases disclose continually the effect of the original prerogative nature of the writ.[3] Thus where a respondent has come to a decision to do or not to do an act, and that decision is judicial in its nature,[4] or involving

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[3] See Cousens *Legal Doubt or Determination as a Ground for Refusing Mandamus* (1936), 24 Georgetown Law Journal, 269.

[4] *Ex Parte Roe*, 234 U. S. 70 (1914); *Re Pollitz*, 206 U. S. 323 (1907); *In Re Parson*, 150 U. S. 150 (1893); *In Re Hawkins*, 147 U. S. 486 (1893); *Ex Parte Flippin*, 94 U. S. 348 (1876); *Ex Parte Secombe*, 19 How. 9 (1857); *Ex Parte Taylor*, 14 How. 3 (1852).

judgment,[5] discretion,[6] or consideration,[7] judicial,[8] or otherwise,[9] the writ of mandamus will not be granted. The leading case raising the question of the propriety of mandamus to a federal executive official who was said "to exercise judgment and discretion" is, of course, *Decatur* v. *Paulding*, 14 Pet. 497 (1840). There Chief Justice Taney was of the opinion that the writ should be refused on the grounds that acts performed by "the head of one of the executive departments of the government, in the administration of the various and important concerns of his office," are not merely ministerial. Even "in expounding the laws * * * of Congress, under which he is * * * required to act" he "is continually required to exercise judgment and discretion." "The court could not * * * by *mandamus* * * * guide and control his judgment or discretion in

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[5] *United States ex rel. Hall* v. *Payne*, 254 U. S. 343 (1920); *United States ex rel. Knight* v. *Lane*, 228 U. S. 6 (1913); *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683 (1912); *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316 (1903); *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636 (1891); *Secretary* v. *McGarrahan*, 9 Wall. 298 (1870); *Ex Parte De Groot*, 6 Wall. 497 (1868); *United States* v. *Commissioner*, 5 Wall. 563 (1867); *United States* v. *Guthrie*, 17 How. 284 (1855); *United States ex rel. Tucker* v. *Seaman*, 17 How. 225 (1855); *Decatur v. Paulding*, 14 Pet. 497 (1840).

[6] *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206 (1930); *Utah* v. *Work*, 273 U. S. 649 (1926); *Work* v. *United States ex rel. Rives*, 267 U. S. 175 (1925); *United States ex rel. Durnford* v. *Work*, 263 U. S. 690 (1924); *Ex Parte Burtis*, 103 U. S. 238 (1880); *Ex Parte Newman*, 14 Wall. 152 (1872); *Ex Parte Many*, 14 How. 24 (1852); *Ex Parte Taylor*, 14 How 3 (1852).

[7] *United States* v. *Lamar*, 116 U. S. 423 (1886).

[8] *Ex Parte Brown*, 116 U. S. 401 (1886); *Ex Parte Burtis*, 103 U. S. 238 (1880); *Ex Parte Newman*, 14 Wall. 152 (1872); *Ex Parte Many*, 14 How. 24 (1852); *Ex Parte Taylor*, 14 How. 3 (1852).

[9] *United States* v. *Lamar*, 116 U. S. 423 (1886); *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206 (1930); *Utah* v. *Work*, 273 U. S. 649 (1926); *Work* v. *United States ex rel. Rives*, 267 U. S. 175 (1925); *United States ex rel. Durnford* v. *Work*, 263 U. S. 690 (1924); *United States ex rel. Hall* v. *Payne*, 254 U. S. 343 (1920); *United States ex rel. Knight* v. *Lane*, 228 U. S. 6 (1913); *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683 (1912); *United States ex rel. Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316 (1903); *United States* v. *Guthrie*, 17 How. 284 (1855); *United States ex rel. Tucker* v. *Seaman*, 17 How. 225 (1855); *Decatur* v. *Paulding*, 14 Pet. 497 (1840).

the matters committed to his care, in the ordinary discharge of his official duties."

In *United States* v. *Lamar,* 116 U. S. 423 (1886) mandamus was sought to compel the Secretary of the Interior to order public land surveys of a certain island in the Mississippi River. The island was claimed adversely to the relator by the City of St. Louis on the ground that it had been surveyed and set apart to it and later carried down the river by the current. Through Mr. Justice Field the Supreme Court stated that "if any doubt may rightfully exist in the mind of" "an executive officer of the government" as to what his duty is in a matter which requires "judgment and consideration to be exercised by" him, "no rule for mandamus to control his action will issue."

Shortly thereafter, in *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40 (1888), it was held that:

> "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law * * *"

And in *United States ex rel. Redfield* v. *Windom,* 137 U. S. 636 (1891), it was held that "disputed questions of law * * * should not be tried in" mandamus.

A more recent case of singular application is *Work* v. *United States ex rel. Rives,* 267 U. S. 175 (1925) having to do with an Act of Congress providing reimbursement for those who had incurred expense and suffered losses in producing manganese during the World War, provided that "it shall appear to the satisfaction of" the Secretary of the Interior that the expense was made "for or upon property" containing manganese, that "no investment for merely speculative purposes" be compensated, and "that nothing * * *

shall be construed to confer jurisdiction upon any court to entertain a suit against the United States." The Secretary decided that the Act did not include reimbursement of the purchase price of real estate. In refusing to sanction mandamus against him, the Court said:

> "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous."

The statute was one granting "a gratuity based on equitable and moral consideration." The reasoning of that case is especially potent in the case at bar because here also, the Congress not only enacted as a part of §30 of the Trading with the Enemy Act that nothing equivalent to execution should be authorized, but had previously enacted in §9 (f) that except as provided in the Act the property under administration should not be subject to any decree of any court, and more recently by Public Resolution 53 had imposed the sole discretion of carrying out the intent of the Congress in the President.

Nor is the application of the above principle rendered questionable by the opinion of this Court on February 17, 1936, in the *Deutsche Bank* case. Even should this Court's conclusion that Public Resolution 53 is unconstitutional ultimately receive the sanction of the Supreme Court, no writ of mandamus could properly be predicated on the rights of the relator and the duties of the respondent as they were presented to the trial court. Certainly the respondent, when demand was made upon him on November 10, 1934, to pay the judgment, had no power to "declare" Public Resolution 53 unconstitutional, and to refuse to carry

out the mandate of the Congress and the President in enforcing its provisions.[10]

That it would not be a proper exercise of judicial powers for a court to issue a writ of mandamus to compel a public official to perform an act which Congress has declared that he should not perform, is a proposition that is supported by case authority as well as by self-evident rules of logic. In *District of Columbia* v. *Eslin,* 183 U. S. 62, the Supreme Court said (page 65):

> "It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, *that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897.*" (Italics supplied.)

Necessarily if a writ of mandamus is properly employed only to compel a public official to perform a duty *imposed by law* (*Reeside* v. *Walker,* 11 How. 272), it cannot be issued where there is no duty to perform but where instead an express prohibition to the contrary exists. Furthermore, when it is kept in mind that a petition for a writ of mandamus is actually brought in the name of the United States, it should be apparent that if Congress itself has prohibited the performance of a certain act, then a court, limited to

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[10] For a trenchant exposition of the principle that no administrative official has any choice between executing or not executing a law because of his opinion as to its constitutionality see *Corwin,* "*Marbury* v. *Madison and the Doctrine of Judicial Review,*" 12 Mich. L. R. 538, 550. In a mandamus case it has been denied that a government official may question the constitutionality of a law requiring him to do a ministerial act. *United States ex rel. Schumacher* v. *Marble,* 14 D. C. 32 (1883). See also, *People* v. *Salomon,* 54 Ill. 39, 46 (1870).

the exercise of judicial powers, may not direct a public official to violate the mandate of Congress.

II.

THE APPELLANT IS NOT ENTITLED TO THE RELIEF HEREIN SOUGHT BECAUSE IT IS AN ATTEMPT TO ENFORCE A "JUDGMENT" WHICH IS COMPLETELY NULL AND VOID.

(A) A "Judgment" Rendered by a Court That Has No Jurisdiction Is Null and Void and May Be Attacked Directly or in a Collateral Proceeding.

The appellant apparently is of the opinion that since the judgment in question was never appealed from and since the term at which it was entered has expired, that it is now too late to resist any action which purports to be predicated upon that judgment. In this he is in error, for he fails to note the very elementary and well-established principle that a judgment rendered by a court having no jurisdiction is void. In *Elliott* v. *Peirsol,* 1 Pet. 328, 340 (1828), the Supreme Court very clearly stated this proposition as follows:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the case; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void; * * *"

In *Earle* v. *McVeigh,* 91 U. S. 503, 507, the Court said:

> "* * * Standard authorities lay down the rule, that, in order to give any binding effect to a

judgment, it is essential that the court should have jurisdiction of the person and the subject-matter; and it is equally clear that the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced, or where any benefit is claimed under it, as the want of jurisdiction makes it utterly void and unavailable for any purpose."

To the same effect is *Vallely* v. *Northern Fire Insurance Co.*, 254 U. S. 348 (1920); Restatement Conflict of Laws, Section 429. In addition a judgment rendered without jurisdiction is one that is not entitled to full faith and credit, *Thompson* v. *Whitman,* 18 Wall. 457 (1873); *National Exchange Bank* v. *Wiley,* 195 U. S. 257 (1904); and may be attacked not only by direct appeal but collaterally in an independent suit. The law is aptly phrased by Ruling Case Law as follows (15 R. C. L. Judgments, Sec. 316):

"In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and it is a fundamental rule that a judgment or decree which the court has no jurisdiction to pronounce is void. It is, in legal effect, no judgment, and has no force either by way of evidence or estoppel, but leaves the parties litigant in the same position they were in before the trial. Unless jurisdiction exists, the judgment is not due process of law, and is ineffectual for any purpose. No rights are in any way affected by it, and from it no rights can be derived, and all proceedings founded thereon are invalid. A decision of a court not having jurisdiction, being thus ipso facto void, may be attacked in any proceeding, direct or collateral, in which a person seeks to assert a right under such pretended adjudication. It may be attached at any time when it is sought to be enforced, or in any suit in which its validity is drawn in question."

Thus, in *State* v. *Armstrong,* 158 Okl. 290, 13 P. (2d) 198, the holders of a judgment against a city on certain bonds sought a mandamus to compel the payment of that judgment. The court found that the prior judgment had been rendered by a court which was without jurisdiction to so do, and that necessarily the judgment was null and void. The petition for writ of mandamus was denied.

The cases cited in the appellant's points and authorities are concerned primarily with attempts to vacate judgments because of alleged errors of law or fact, and it is true that in such cases a collateral attack is improper. But where the purported judgment is rendered by a court without jurisdiction, then it is null and void and subject to both direct and collateral attack.

In *MacFarland* v. *Saunders,* 25 App. D. C. 438, the court pointed out that it did not matter how long the person aggrieved by the void judgment had waited and that "he could move to vacate at any time or he could wait until an attack was made and then resist such enforcement as far as it related to his property." See also *District of Columbia* v. *Humphreys,* 12 App. D. C. 122; Freeman on Judgments, 5th ed. 1925, Section 333; *Thompson* v. *Whitman, supra; National Exchange Bank* v. *Wiley, supra.*

(B) No Valid Judgment Was Rendered Against Homer S. Cummings Because He Was Never Properly Made a Party to the Proceeding so as to Give the Court Jurisdiction to Enter Its Judgment Against Him.

It is beyond controversy, and the record is clear that the attachment action was brought against Urey Woodson, the then Alien Property Custodian, that service of the writ, interrogatories and notices were upon

Urey Woodson, and that it was Urey Woodson who answered said interrogatories (R. 3, 4, 24, 25). Under Executive Order No. 6694 of May 1, 1934, the office of the Alien Property Custodian was abolished effective sixty-one days after May 1, 1934, and the said Urey Woodson became *functus officio* upon June 30, 1934.

The Judicial Code provides (28 U. S. C. A. §780):

> (a) * * * Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.
>
> (c) * * * Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

In other words, in order to continue the action against Homer S. Cummings, an application within six months should have been made to the court setting forth the facts and reasonable notice of the application should have been given to the said Homer S. Cum-

mings. *But this was never done.* That it was never done is clearly shown by the answer of the appellee, to which the appellant herein demurred (R. 12, par. 6). *No interrogatories were served upon the appellee herein, no attachment was made of funds in his hands, nor was any notice* [11] *served upon him of the pendency of the said action.* A garnishee is a real party defendant; he has the right and duty to plead any pleas which the principal defendant might or could plead; he is entitled to interpose defenses of his own; (See §§459, 472 of Code) and a judgment against a garnishee for credits admitted or found is of the same legal significance as a judgment rendered in any action against him upon an ordinary debt claim. (See §467 of Code.) Despite these facts no order has ever been made substituting as garnishee Homer S. Cummings for Urey Woodson, the original garnishee, nor has any additional attachment, as permitted by §448 of the Code, been directed or executed against the said Homer S. Cummings.

It is quite evident, therefore, that no proper service upon, or substitution of Homer S. Cummings in accordance with the provisions of the Judicial Code and Code of Laws for the District of Columbia, has ever been made. That those provisions must be complied with in Alien Property matters has been decided in *Kuttroff* v. *Sutherland,* 49 F. (2d) 944, aff'd. 66 F. (2d) 500; *Becker Steel Co.* v. *Hicks,* 1 Fed. Supp. 300, 66 F. (2d) 497; and *Sutherland* v. *Kreisch,* 59 App. D. C. 351. A recent recognition by this Court of the controlling nature of the requirement that succeeding

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[11] In *Secretary* v. *United States, ex rel. McGarrahan,* 9 Wall. 298, the Supreme Court stated (313):

> "Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts, and the better opinion is, that a judgment rendered without notice may be shown to be void when brought collaterally before the court as evidence." *Nations* v. *Johnson,* 24 How. 203, 16 L. ed. 631.

public officials must be formally substituted may be found in *Black Clawson* v. *Robertson,* 71 F. (2d) 536.

The fact that judgment is directed against Homer S. Cummings does not indicate, as the appellant would urge, that the judgment was a proper one. Quite to the contrary, the fact that the court entered a judgment against Homer S. Cummings without properly making him a party to the suit by an order of substitution after notice, and without the service of a writ or notice upon him as required by §§446 and 456 of the Code, is the very defect of which the appellee complains.

(C) By Reason of Enactment of Public Resolution 53, 73rd Congress, the "Judgment" in Controversy Was Rendered by a Court That Had No Jurisdiction Over the Subject Matter of the Suit.

If Public Resolution 53 is a constitutional enactment, it follows necessarily that the judgment, of which payment is now sought, is one that was rendered by a court that had no jurisdiction to do so. It is a judgment which was rendered pursuant to an attachment action which purportedly was brought under Section 30 of the Trading with the Enemy Act, as amended. That section permits attachment actions as to "any money or other property *returnable* under subsections (b) or (n) of Section 9" of the Trading with the Enemy Act. This statutory requirement that "returnable" property must be held by the Custodian is a requirement that is jurisdictional and cannot be waived by any official. *Cf. Finn* v. *United States,* 123 U. S. 227.

It should be apparent, therefore, that if property or credits are not "returnable" under subsections (b) or (n) of Section 9, then a court is without jurisdiction to entertain an attachment action under Section 30, and to enter a judgment of condemnation pursuant

thereto. The appellant apparently recognizes the validity of this statement and in an attempt to offset its effect merely states (p. 27) that this property was returnable and is still returnable under subsection (b) of Section 9.[12] It is the appellee's contention that Public Resolution 53 destroyed the returnability of property seized under the Trading with the Enemy Act, and as long as that resolution is not repealed, there exists no property which is subject to attachment proceedings and to a judgment in condemnation. Public Resolution 53 was passed on June 27, 1934, and provided in part that:

> "all payments, conveyances, transfers, or deliveries of money or property * * * authorized or directed to be made under the Trading with the Enemy Act, as amended, * * * whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property or the income, issues, profits, and/or avails thereof reserved;"

This resolution was approved on the same date that the suit against the German debtors was instituted and under established legal principles was in effect from the very first minute of the day on which it was so approved;[13] and of course was in effect on September 18, 1934, when the court purported to enter a judgment in condemnation against the Attorney General. After the enactment of this resolution, therefore, the property which was held by the Alien Property Custodian

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[12] Webster's New International Dictionary (1925) defines returnable as (1) law. Legally required to be returned, delivered or rendered; as a writ returnable at a certain day; a verdict returnable to the court, (2) that must be returned; to be returned, (3) capable of, or admitting of, being returned.

[13] *Lapeyre* v. *United States*, 17 Wall. 191, 198 (1872); *United States* v. *Norton*, 97 U. S. 164, 170 (1877); *In re Howes*, 21 Vt. 619; *Arrowsmith* v. *Hamering*, 39 Ohio St. 573; *Lehigh Carriage Co.* v. *Stengel*, 95 Fed. 637, 640; *Tomlinson* v. *Bullock*, 4 Q. B. Div. 230.

could not lawfully have been returned to the German debtors. They could not have compelled such return and the Alien Property Custodian could not lawfully as an administrative matter have permitted such return. Since Section 30 provided that property which was *returnable* under subsection (b) of Section 9, was subject to attachment actions, and since the property which the appellant sought to attach was property which was no longer returnable to the original owner, then the court was without jurisdiction to act in respect thereto.

This construction of Section 30 as affected by the enactment of Public Resolution 53 is consistent with the elementary rule of statutory construction that any interpretation which has the effect of causing an unreasonable or ridiculous result is to be avoided. If jurisdiction to entertain attachment actions under Section 30 continued to exist after June 27, 1934, as claimed by the appellant, a very peculiar situation would result. On the one hand we would find that a German national was prohibited by Public Resolution 53 from directly securing any property held by the Custodian, but on the other hand and at the same time we would find that despite this disability the German national could incur debts which he could satisfy by directing his creditors to bring collusive attachment actions under Section 30.

The conclusion that the "judgment" in controversy was rendered by a court that had no jurisdiction over the subject matter of the suit, is a conclusion that can not be avoided if Public Resolution 53 is a constitutional enactment, and necessarily the appellant should not be permitted to enforce a "judgment" which is completely null and void.

Point II of the appellant's brief is apparently designed to show that it was beyond the power of Con-

gress to remove the jurisdiction previously conferred by Section 30. The appellant states (page 20):

> "The relator had a vested property right which had arisen upon a contract, and which accrued prior to June 27, 1934, to sue and recover the amount contained in his judgment of condemnation. That property right could not be destroyed or impaired by statute."

This statement is ambiguous and craftily worded. That the appellant by rendering services to the German debtors secured a vested right against them and that that right still exists cannot, of course, be denied. But the appellee does deny that the appellant secured any vested right in the *remedy of suit against the United States under Section 30.* It is hornbook law that the United States can not be sued without its consent and it is equally well established that such consent may be removed at any time.

The appellant urges (page 21) that "the relator performed his services in reliance upon his rights under that statute." Aside from the fact that the petition contains no allegation to this effect, it may be noted that Section 30 was enacted in 1928, and the appellant tells us (page 20) that the services for which suit was brought were rendered from the year 1922. But even if the appellant had "relied" on the special remedy conferred by the statute, that reliance was no bar to its subsequent removal. The cases cited by the appellant (page 21) are concerned with efforts of legislatures to destroy not remedies, but the very rights and liabilities of individuals. In *Chemical Foundation* v. *Du Pont De Nemours & Co.*, 29 F. (2d) 597, cited by the appellant (pages 21-22) an attempt was made to construe the Trading with the Enemy Act so as to destroy certain choses in action which were owned by the Chemical

Foundation, and obviously this was improper. Such cases are far different from the case at bar, where the appellant's status as a creditor of certain German citizens remains entirely unaltered. It must also be remembered that the remedy conferred by Section 30 was not conferred "in recognition of an obligation imposed by the Constitution" as was the case in *Becker Steel Co.* v. *Cummings,* 296 U. S. 74. On the contrary, the United States was under no duty to grant it and was under no duty to retain it.

Since the appellant's judgment is void not only because the court was without jurisdiction under Public Resolution 53, but also because the appellee was never made a party to the action in which the judgment was rendered, it is clear that the appellant has no unquestionable right to relief. The law relating to mandamus is settled that the writ will not issue where the relator's right is doubtful. *United States ex rel. Redfield* v. *Windom,* 137 U. S. 636 (1891); *People ex rel. Third Avenue R. Co.* v. *Newton,* 112 N. Y. 396, 19 N. E. 831 (1889).

III.

THE APPELLANT IS NOT ENTITLED TO THE RELIEF HEREIN SOUGHT BECAUSE THE CODE OF LAWS FOR THE DISTRICT OF COLUMBIA PREVENTS AN ATTACHING CREDITOR FROM ASSERTING RIGHTS GREATER THAN THOSE OF HIS DEBTOR.

The argument to be presented hereunder unfolds in an orderly and logical sequence. The lower court found in this argument alone sufficient reason for deny-

ing the appellant's petition for a writ of mandamus (see appellant's brief, page 23).

The Code of Laws for the District of Columbia, Title 24, Chapter 6, Section 143 (31 Stat., 1263, c. 854, sec. 467), provides in part as follows:

> "If a garnishee shall have admitted *credits* in his hand, in answer to interrogatories served upon him, or the same shall have been found upon an issue made as aforesaid, judgment shall be entered against him for the amount of credits admitted or found as aforesaid, not exceeding the plaintiff's claim, less a reasonable attorney's fee to be fixed by the court, and costs, and execution had thereon; *but if said credits shall not be immediately due and payable, execution shall be stayed until the same shall become due;* * * *"

In other words, if credits attached in the hands of a garnishee, are not immediately due and payable, then no execution by the attaching creditor is permitted until the credits do become immediately due and payable. Thus we find in statutory form a recognition of the well-established rule that an attaching creditor cannot assert rights greater than those of his debtor. *Zinc* v. *Black Star Line,* 57 App. D. C. 114, 18 F. (2d) 156.

Section 30 of the Trading with the Enemy Act, as amended, provides in part as follows:

> "Any money or other property returnable under sub-section (b) or (n) of section 9 shall, at any time prior to such return, be subject to attachment *in accordance with the provisions of the code of law for the District of Columbia,* as amended, relating to attachments in suits at law and to attachments for the enforcement of judgments at law and decrees in equity, but any writ of attach-

> ment or garnishment issuing in any such suit, or for the enforcement of any judgment or decree, shall be served only upon the Alien Property Custodian, who shall for the purposes of this section be considered as holding *credits* in favor of the person entitled to such return to the extent of the value of the money or other property so returnable * * *"

The language which has been italicized above reveals two significant features of this section. First, that attachment proceedings under Section 30 are to be governed by the provisions of the Code of Laws for the District of Columbia, and second, that the Alien Property Custodian is to be considered as holding *credits* in favor of the person entitled to the return of property. It is apparent, therefore, that the provision of the Code, quoted at the outset of this argument, is applicable to the condemnation judgment which the appellant herein secured; a judgment, the payment of which he is now attempting to compel by a writ of mandamus.

Public Resolution 53, 73rd Congress (48 Stat. 1267) (Appendix B), provides in part as follows:

> "* * * all payments, conveyances, transfers, or deliveries of money or property, or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved * * *"

If this resolution is a constitutional enactment, it is quite evident that the credits held by the Alien Prop-

erty Custodian and attached by the appellant are not "immediately due and payable" by the Custodian to the former German owners, and therefore that to compel the payment of the appellant's condemnation judgment would be contrary to the provisions of the Code of Laws for the District of Columbia.

To this argument the appellant can find no answer. On page 26 of his brief he attempts to rebut it by referring back to his Point II, and by stating that his "writ of attachment did not attach credits but attached specific personal property." Point II, which was discussed heretofore, has no bearing on this argument because it treats solely of the question of whether the United States may remove the remedy provided for by Section 30. That the appellant's writ could not have attached specific personal property is obvious in view of the specific provision in Section 30 that for the purposes of that section the Custodian was to "be considered as holding *credits.*"

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

JAMES W. MORRIS,
Assistant Attorney General,

HARRY LEROY JONES,
Attorney, Department of Justice,

EDWARD FIRST,
Attorney, Department of Justice,

Attorneys for Appellee.

APPENDIX A.

EXECUTIVE ORDER.

REMOVING, IN CERTAIN CASES, RESTRICTIONS IMPOSED BY PUBLIC RESOLUTION 53, OF JUNE 27, 1934, AS TO PAYMENTS, TRANSFERS, AND DELIVERIES OF PROPERTY UNDER THE TRADING WITH THE ENEMY ACT AND THE SETTLEMENT OF WAR CLAIMS ACT OF 1928.

By virtue of and pursuant to the authority vested in me by Public Resolution 53, approved June 27, 1934 (48 Stat. 1267), the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411), as amended, and the Settlement of War Claims Act of 1928, approved March 10, 1928 (45 Stat. 254), I do hereby order as follows:

Section 1. For the purpose of the said resolution, it is hereby determined that Germany has been and is now in arrears in payments of principal and interest under the debt-funding agreement between Germany and the United States dated June 23, 1930, with respect to the obligations of Germany on account of awards entered and to be entered by the Mixed Claims Commission, United States and Germany. The period in which Germany is in arrears shall be deemed to continue for the purposes of this order until it is determined by the President that such period has terminated.

Section 2. The restrictions imposed by the said resolution are hereby removed except as to the following payments, conveyances, transfers, or deliveries of money or property or of the income, issues, profits, or avails thereof:

1. To any person who was on April 6, 1917, or who at any time since that date has been, a German national, unless such person is entitled to receive payment under section 9, subsection (b) (1), of the Trading with the Enemy Act, as amended,

or unless such person is a national of the United States at the time of payment, conveyance, transfer or delivery, and was on June 1, 1934, the legal and beneficial owner of the claim to the money or property or the income, issues, profits, or avails thereof, and on or before June 1, 1934, the United States received written notice of such ownership.

2. To any person domiciled or resident within the territory of Germany, except a natural person who is a national of the United States at the time of payment, conveyance, transfer, or delivery.

3. To any corporation, association, or partnership, or other unincorporated body of individuals or a body politic which on or at any time since April 6, 1917, was organized or existed under the laws of Germany or had its principal place of business in Germany.

4. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic in which a substantial legal or beneficial interest is owned directly or indirectly by any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof, or to any person who is a trustee of such money or property for a person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 thereof.

5. To the heirs, devisees, legatees, executors, administrators, representatives, creditors, successors, or assigns of any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, 3, or 4 hereof, except to such heirs, devisees, or legatees as are natural persons and have been nationals of the United States from June 1, 1934, to the time of payment, conveyance, transfer, or delivery.

Section 3. For the purposes of this Executive Order, (*a*) the nationality, residence, domicile, or other qualification of claimants under the Trading with the Enemy Act, as amended, shall be that determined by

the Attorney General; and (*b*) the nationality, residence, domicile, or other qualification of claimants to money or property or the income, issues, profits, or avails thereof, held in the German Special Deposit Account, and in the Austrian and Hungarian Special Deposit Accounts, shall be that determined by the Secretary of the Treasury.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
March 2, 1935.

APPENDIX B.

EXECUTIVE ORDER.

Section 2 of Executive Order No. 6981, of March 2, 1935, removing, in certain cases, restrictions imposed by Public Resolution 53, of June 27, 1934 (48 Stat. 1267), as to payments, transfers, and deliveries of property under the Trading with the Enemy Act (40 Stat. 411) and the Settlement of War Claims Act of 1928 (45 Stat. 254), is hereby amended to read as follows:

"Section 2. The restrictions imposed by the said resolution are hereby removed except as to the following payments, conveyances, transfers, or deliveries of money or property or of the income, issues, profits, or avails thereof:

1. To any person who was on April 6, 1917, or who at any time since that date has been, a German national, unless such person is entitled to receive payment under section 9, subsection (b) (1), of the Trading with the Enemy Act, as amended, or unless such person is a national of the United States at the time of payment, conveyance, transfer, or delivery, and was on June 1, 1934, the legal and beneficial owner of the claim to the money or property or the income, issues, profits, or avails thereof, and on or before June 1, 1934, the United States received written notice of such ownership.

2. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic which on or at any time since April 6, 1917, was organized or existed under the laws of Germany or had its principal place of business in Germany.

3. To any corporation, association, or partnership, or other unincorporated body of individuals, or a body politic in which a substantial legal or beneficial interest is owned directly or indirectly by any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1 or 2 hereof, or to any person who is a trustee of such money or property for a person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1 or 2 hereof.

4. To the heirs, devisees, legatees, executors, administrators, representatives, creditors, successors, or assigns of any person to whom payment, conveyance, transfer, or delivery continues to be postponed under subdivision 1, 2, or 3 hereof, except to such heirs, devisees, or legatees as are natural persons and have been nationals of the United States from June 1, 1934, to the time of payment, conveyance, transfer, or delivery, and except to such creditors as are not German nationals and are eligible claimants under section 9, subsections (a) and (e) of the Trading with the Enemy Act, as amended."

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
July 22, 1935.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAY 21 1936

Monroe Burdett
CLERK

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6647

UNITED STATES EX REL. MAX D. ORDMANN, *Appellant*,

v.

HOMER S. CUMMINNGS, ATTORNEY GENERAL OF THE UNITED STATES, *Appellee*.

APPELLEE'S REPLY TO "SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE APPELLANT."

JAMES W. MORRIS,
Assistant Attorney General,

HARRY LEROY JONES,
Attorney, Department of Justice,

EDWARD FIRST,
Attorney, Department of Justice,

Attorneys for Appellee.

FREA PRINTING COMPANY, WASHINGTON, D. C.

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

UNITED STATES EX REL. MAX D. ORDMANN,
Appellant,

v.

HOMER S. CUMMINGS, Attorney General of the United States,
Appellee.

No. 6647

APPELLEE'S REPLY TO "SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE APPELLANT."

The supplemental memorandum filed by the appellant is primarily directed to the appellee's defense that no valid judgment was rendered against Homer S. Cummings because he was never made a party to the proceedings as required by the Substitution Act (28 U. S. C. A. §780). The appellant's arguments apparently fall into three headings:

1. The Substitution Act does not apply to a garnishee, and further,
2. No formal notice to a garnishee of an application for a judgment is necessary, but if it is,
3. The garnishee herein did have notice of the application for judgment.

1. *That the Substitution Act does not apply to a garnishee.* The hub of the appellant's reply to the argument that the requirements of the Substitution Act have not been complied with is that a garnishment action under §30 of the Trading with the Enemy Act is not an action "against an officer of the United States" within the wording of the Substitution Act. The error of this conclusion is self-evident when it is recalled that in garnishment proceedings in general the judgment against the individual garnishee is a personal judgment, irrespective of the nature of the judgment against the principal defendant, and when it is recalled that the case at bar involved an action under §30 of the Trading with the Enemy Act, an action which is deemed by this Court to be a garnishment action against "credits" held by the Alien Property Custodian.

The proposition that all attachment actions under §30 are to be considered garnishment actions, reaching credits in the hands of the Custodian, was settled by this Court in *Sutherland* v. *Kreisch,* 59 App. D. C. 351, wherein it was said (page 352):

> "In our opinion section 30 forbids the actual seizure of any property in the hands of the Custodian by the court officer who serves the writ of attachment, but the section specifically permits of the levy of the attachment upon the property held by the Custodian, and provides that for the purposes of such levy the Custodian shall be considered as holding credits in favor of the person entitled to the return of the property to the extent of the value of the money or other property returnable under the act as amended. *This provision converts the writ of attachment issued against the Custodian under section 30 into a writ of garnishment, regardless of the kind of property af-*

fected by it in the hands of the Custodian.'' (Italics supplied.)

We can turn to the Supreme Court of the United States and the Supreme Court of Maryland for decisions establishing the propositions that in garnishment actions the judgment against the garnishee is a personal judgment and that the judgment is valid only if process was personally served upon the garnishee. In *Buschman* v. *Hanna,* 72 Md. 1, 5, 6, the court said:

> ''The code provides that 'any kind of property or credits belonging to the defendant in the plaintiff's own hands, or in the hands of anyone else may be attached.' Where specific property is attached, the attachment is levied on such property; but, where money or credits are attached, the inchoate lien attaches to the fund or credits when the attachment is laid in the hands of the garnishee. *In the latter case, that is of garnishment, the judgment is a personal judgment against the garnishee.''* (Italics supplied.)

In the leading case of *Harris* v. *Balk,* 198 U. S. 215, the Supreme Court of the United States said (page 222):

> ''Attachment is the creature of the local law; that is, unless there is a law of the State providing for and permitting the attachment it cannot be levied there. If there be a law of the State providing for the attachment of the debt, then if the garnishee be found in that State. *and process be personally served upon him therein,* we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, provided the garnishee could himself be sued by his creditor in that State. * * * *Power over the person of the garnishee confers jurisdiction on the courts of the State where the writ issues.''* (Italics supplied.)

In the light of these decisions it can hardly be said that a suit under §30 of the Trading with the Enemy Act does not involve, in form at least, a suit "against an officer of the United States." But if, as the appellant contends, there has been no suit against an officer of the United States but instead merely a condemnation of a certain *res* then he has argued himself out of court. It is an elementary rule of law that no action of mandamus will lie where there is no personal obligation to pay, and if there has been no suit against an officer of the United States, upon what can be predicated the alleged personal duty? To the appellant's contention that he did everything required of him in procuring his judgment, it should be a sufficient answer to point out that whatever else he may have done he failed to comply with the specific requirements of the Substitution Act. The appellee respectfully directs the attention of the Court to his original discussion of this defense on pages 23 to 26 of his original brief.

2. *That no formal notice to a garnishee of an application for a judgment is necessary.* It must be kept in mind that the problem of "notice" as discussed by the appellant has nothing to do with the problem concerning the applicability of the Substitution Act. If that Act is applicable to suits under §30 of the Trading with the Enemy Act, then there is no doubt that it has not been complied with; that there was neither substitution nor notice of an application for substitution of the appellee for Urey Woodson, the predecessor in office.

Unfortunately the appellant does not indicate the exact relevancy of his discussion of "notice." The appellee has never urged, and does not now urge, that formal notice to a garnishee of an application for a judgment against said garnishee is necessary. It is conceded that no formal notice is required. The ap-

pellee does, however, urge that a valid judgment can not be rendered against a third person who was never made a party to the proceedings by summons or by statutory substitution. It is this latter type of judgment which the appellant herein seeks to enforce; a judgment rendered by a court which had never secured jurisdiction over the person against whom the judgment was entered.

3. *That the garnishee herein did have notice of the application for judgment.* The appellant also urges that the appellee actually did have notice, and, it is to be observed, the notice of which he speaks is the notice of the application for judgment. The reply to this "argument" is two fold:

a. The record is to the contrary. This case arises upon a demurrer to the answer of the appellee. Paragraph 9 of said answer (R. 10, 11) reads as follows:

> "The respondent admits that he has never appealed from the purported judgment of condemnation entered on September 18, 1934, but avers that he personally received no notice of the entry of said judgment until November 11, 1934, which date was after the time had elapsed for taking an appeal therefrom, except that the respondent is informed that the attorney for said Ordmann, the relator, on or about September 24, 1934, advised one W. L. Gates, an attorney in the Claims Section of the Alien Property Bureau of the entry of said judgments and handed him a certified copy thereof, and Mr. Justice Adkins also telephoned to said Gates thereafter with reference to said judgment; that said Gates had no authority to act for the Attorney General in litigated matters, nor otherwise to receive notice of any such matters on behalf of the Attorney General; that the first notice of the pendency of the litigation and of the entry of the judgments which came to the attention of the re-

spondent consists of a letter addressed to the Attorney General under date of November 10, 1934, by the attorney for the relator, demanding payment of the purported judgment of condemnation."

b. A notice to one who has never been made a party to the proceedings that an application has been made for judgment against him does not of itself make the judgment a valid one, especially where that notice is not a judicial summons or other form of judicial process. This would appear to be a basic proposition of common law jurisprudence. The assertions by the appellant are admittedly outside of the record, but even if true, they do not show that jurisdiction was ever secured over the appellee by proper judicial process.

The supplemental memorandum on behalf of the appellant contains two other assertions which for the purpose of the record should not go unanswered.

1. It it asserted (page 2) that "the court below did not agree with the contention of the appellee that the appellee had to be substituted by name prior to the entry of the judgment of condemnation." This assertion is beyond the record and without basis in fact because the problem of the failure to comply with the Substitution Act was not urged in oral argument before the lower court. It was unnecessary to do so at that time because the argument was had prior to the decision of this Court in the *Deutsche Bank* case (No. 6471), and therefore the lower court deemed the judgent in controversy ineffective in other respects. (See appellee's Argument III, Brief, page 30, et seq.)

2. It is asserted (page 11) that Mr. John J. Greenleaf was General Counsel for the Alien Property Bureau. The exact facts are that John J. Greenleaf was General Counsel to the Alien Property Custodian, Urey

Woodson, and as such became *functus officio* at the same time as the Custodian, on June 30, 1934, and was not in charge of alien property cases after that date.

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

JAMES W. MORRIS,
Assistant Attorney General,

HARRY LEROY JONES,
Attorney, Department of Justice,

EDWARD FIRST,
Attorney, Department of Justice,

Attorneys for Appellee.